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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

R. L. SWEET LUMBER COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Charles E. Hoffhaus,
HILLIX, BREWER, HOFFHAUS,
GRIER & WHITTAKER
2715 Commerce Tower
Kansas City, Mo. 64105

Attorneys for Petitioner

August 25, 1975

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FOR THE TENTH CIRCUIT

The petitioner, R. L. SWEET LUMBER COMPANY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 5, 1975.

OPINIONS BELOW

The Decision and Proposed Order of the Administrative Law Judge, Case No. 17-CA-5292, John F. Corbley, Administrative Law Judge, is unreported and is printed in Appendix A, infra, pp. 1 - 52, App. (The Appendix("App.") is printed and paginated separately). The Decision and Order of the National Labor Relations Board is reported at 207 NLRB No. 89 and 1974 CCH NLRB ¶25,971 (see Appendix B, infra, pp. 53 - 54, App.). The Opinion of the Court of Appeals for the Tenth Circuit is reported at 515 F.2d 785 (see Appendix C. infra, pp. 55 - 76, App.).

JURISDICTION

The judgment of the Court of Appeals (see Appendix D, p. 77, App., infra) was entered on June 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTION PRESENTED FOR REVIEW

Does the continuing recognition and enforcement by an employer after the barred statutory limitations period, of a labor contract entered into with a union which did not represent a majority, as in this Court's 1960 Bryan decision cited infra, constitute an actionable unfair labor practice (or is this Court willing to allow Bryan to be ignored)?

STATUTORY PROVISION INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C.A. §160(b), p.5, provides in pertinent part:

> That no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board [National Labor Relations Board] and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed

forces, in which event the six-month period shall be computed from the day of his discharge.

STATEMENT OF THE CASE

Petitioner, R. L. Sweet Lumber Company, a Missouri corporation qualified to do business in Kansas (the "Company") has operated a lumber business since 1952 on Roe Boulevard in Kansas City, Kansas where, as well as selling lumber and other building materials, it has manufactured and sold millwork such as windows, doors and room dividers, and also single-package prefabricated homes. The prefab home manufacturing activity was known as the Standard Homes Division. It was not a separate legal entity until November 1971, at which time the name of an available subsidiary was changed to Standard Homes Company and the prefab equipment was sold to that subsidiary.

The prefab manufacturing employees at Roe Boulevard, some 16 in number, were members of Carpenters Local 1635 and were represented by the Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, ("Union" or "Carpenters") in a separate unit. Seven or eight of these employees spent all or most of their time in prefabrication and assembly of the packaged homes. Another unit, composed of warehouse and yard employees (e.g., lumber handlers, truckdrivers, loaders, forklift operators, stockmen, etc.), was represented by Teamsters Local 541.

Because its prefab home operation at Roe Boulevard was cramped and inefficiently organized, the Company decided in about 1970 to build a new plant at Olathe, Kansas, about 19 miles away and the parties stipulated to the economic necessity

of this move. In January 1972, with the new plant almost completed, Standard Homes Company hired four new employees to work at the Olathe plant. (At least three of these initial four employees later worked on the production line for prefab homes at Olathe.) During their first month, before production started, these four men unloaded the initial lumber deliveries at Olathe and did carpentry work, building racks and other facilities preparatory to the manufacture of prefab homes.

On January 24, 1972, a business agent of Teamster Local 541 visited Olathe and obtained signed authorization cards from all four men and presented them to the Company. Standard Homes Company and Teamsters Local 541 executed a contract on February 11, 1972 (the "Olathe contract") which ran from February 7, 1972 until February 2, 1975, with a provision for

automatic renewal. The contract gave Local 541 representation over "all production and maintenance employees at the Employer's Olathe, Kansas, plant including truck drivers". One of its provisions required unit employees to join Local 541 after 31 days of employment.

By its later actions, including actions considerably more than six months after the signing of the Olathe contract, the Company (and its subsidiary Standard Homes Company) gave lawful recognition and enforcement to the Olathe contract by advising new production and maintenance workers that they were subject to the contract with Teamsters Local 541, checking off dues, paying the wage scale referred to therein, and in general adhering to the terms thereof. The Carpenters sought, and the Company declined, bargaining with respect to the Standard Homes production

workers in about February of 1972, and later Carpenters grievance and arbitration attempts were also rejected by Company, because of the binding effect of the Teamsters contract.

This proceeding was initiated by an unfair labor practice charge filed by the Carpenters and served on the Company on August 18, 1972 (six months and seven days after the date of signing the Olathe Teamsters contract). As hereinafter noted, the District Director dismissed the original charge, but it was later reinstated by direction from the National office. The case was heard before the U. S. Tenth Circuit Court of Appeals upon the application of the National Labor Relations Board pursuant to jurisdiction granted by Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et

seq.), for enforcement of its order issued against the Company on November 23, 1973. That Court had jurisdiction of the proceeding, the alleged unfair labor practices having occurred in the State of Kansas. Judgment was entered by the U. S. Tenth Circuit Court of Appeals on June 5, 1975 enforcing the aforesaid order of the NLRB against Company.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are two:

(a) The Bryan NLRB statute of limitations case, decided by this Court on virtually identical facts, and cited infra, was not followed by the Court of Appeals, opening the way for burdensome disposition of a huge volume of otherwise time-barred unfair labor practice cases.

(b) The decision of the Tenth Circuit Court of Appeals is in conflict with

those of other circuits on the same issue, thereby inviting the exercise of this Court's power of supervision to foster uniformity.

This appeal assumes arguendo that (1) in early February, 1972 (pre-February 19) the Teamsters card-signers were in the minority insofar as the eventual unit was concerned, as in the Bryan case; (2) Standard Homes was the alter ego of the Company; (3) all work granted to the Teamsters by the contract of February 11, 1972 (i.e., all production and maintenance work) was work previously contracted to a certified union, Carpenters Local 1635 of the K. C. Carpenters District Council, as in the Bryan case; and (4) that the contract continued to be enforced and maintained by Company and Standard Homes after the six month limitations period, as in the Bryan case.

The Regional Director (who dismissed the original charge), the Law Judge, the Board and the Court of Appeals all agreed with Company that the recognition of, and execution of a contract with, the Teamsters at the Olathe plant are not actionable because these two actions are barred because of this Court's ruling in Bryan. The only dispute is over later enforcement.

The issues herein were all decided by this Court in Local No. 1424, International Machinists v. NLRB, 362 U.S. 411 (1960) 4 L.Ed. 2d 832, 80 S. Ct. 822, commonly known as the Bryan Manufacturing Company case. The Bryan case dealt with the application of Section 10(b) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U.S.C. §160(b) which provides, in pertinent part, as follows:

> "Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six

> months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made***" (Emphasis supplied)

This Court cited the legislative history of the Section to the effect that it was designed to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused" (l.c. 419).

In the Bryan case, this Court made it clear that events barred by the limitation cannot be used to "taint" later events which are not, in and of themselves (and without reference to barred unfair practices), unfair.

Yet the Court below, ignoring this prohibition, felt free to look at later hirings and enforcement of Teamsters' wages, check-off, pension, and other contract terms in isolation, even though pre-

dicated on the barred contract. This Court thoroughly explored this issue in the Bryan case, and succinctly stated that (l.c. 423):

> "In any real sense, then, the complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the §10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement." (Emphasis is the Court's).

Standing alone, Company's acts were totally innocuous and it is only by lifting the bar and finding the inception of the agreement to be an unfair labor practice

that the General Counsel seeks to challenge them.

The Court below suggests that Bryan can be selectively applied because the original minority union was not a representative complement as to the prefab employees. The avowed purpose of the NLRB, according to its counsel, was to splinter off from the Bryan case situations (such as here) where the barred contract was made with a "minority" union. Would this Court allow Bryan thus to be distinguished and rendered ineffective? This would open the floodgates to time-barred labor litigation!

The factual background revealed by the appellate history of the Bryan case shows that the majority Bryan employees (the U.A.W. adherents) were in the same relative position as the complaining Carpenters here and the issue was decided against the U.A.W. and for the minority union (Machin-

ists). If the "complement" was "not representative," that very situation obtained on February 11, 1972 when the Teamsters' contract was signed. (Actually, there was a representative complement since at least three of the original four Teamsters card signers later worked as production workers on the line.)

The whole thrust of Bryan was to protect companies in time-barred minority union situations such as this. In Bryan, this Court said (l.c. 425, f.n.16):

> "16. The immediate impetus of the legislation was the pendency of an NLRB proceeding involving a closed-shop agreement in effect at the Kaiser shipbuilding yards in Portland, Oregon. The agreement, though executed at a time when only 66 workers were employed, was being applied to a 20,000-man work force. The debates show that the issue of representation by minority unions was in the forefront of legislative concern." (Emphasis supplied)

The Bryan case dealt with an extreme minority union situation. As Mr. Justice

Whittaker pointed out in his dissent (l.c. 433, f.n.1):

> "In fact the undisputed testimony was that the union did not then represent a single one of the employees, and that the employer acceded to the union's demand for recognition and entered into the contract simply because the union had it 'over a barrel'" (Emphasis supplied.)

The other Circuit Courts of Appeal have uniformly followed the holding of this Court in the Bryan case. Typical of these cases is the opinion of the Sixth Circuit in Tennessee Products Chemical Corp. vs. NLRB, 423 F.2d 169 (CCA6 1970), dealing with enforcement of a time-barred contract similar to that in the instant case, and following Bryan, supra. In that case, as here, the employer was alleged to have contracted with a minority union which did not actually represent the employees in the unit at the time of the contract. That minority non-representative condition con-

tinued, but the Court refused to apply a "continuing violation" theory after the barred period. The Court said (l.c. 180):

> "The charge of violation of Section 8(a)(1) and (2) was not made until July 1, 1965, almost a year after the accused contract or contracts of July 16, 1964. If there was a violation, that is the date it occurred. The assertion of the Board that the contract, to run for three years, was a continuing violation, was considered and disposed of by the Supreme Court's opinion in [Bryan] (citing the quotation, supra, from p.423 of the Bryan case).

To like effect (§10(b) running from date of contract) was NLRB vs. Brown, (CCA 9, 1962), 310 F.2d 539.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this peti-

tion for a writ of certiorari should be granted.

August 25, 1975.

HILLIX, BREWER, HOFFHAUS,
GRIER & WHITTAKER

By _____
Charles E. Hoffhaus
2715 Commerce Tower
Kansas City, Mo. 64105
Phone: (816) 221-0355
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-3211

R. L. SWEET LUMBER COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES E. HOFFHAUS
HILLIX, BREWER, HOFFHAUS, GRIER & WHITTAKER
2715 Commerce Tower
Kansas City, Missouri 64105
Attorneys for Petitioner

August 25, 1975

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

R. L. SWEET LUMBER COMPANY

and

CARPENTERS' DISTRICT COUNCIL OF KANSAS CITY AND VICINITY, AFL-CIO

and

TEAMSTERS LOCAL 541
Party to the Contract

Case No. 17-CA-5292 85 LRRM 1073

(Decision Issued May 18, 1973)

DECISION

Statement of the Case

JOHN F. CORBLEY, Administrative Law Judge: A hearing was held in this case on March 6, 7 and 8, 1973, at Kansas City, Kansas, pursuant to a charge filed on August 18, 1972, a complaint and notice of hearing dated October 20, 1972, and an amended complaint and notice of hearing dated December 26, 1972, both issued by the Regional Director for the Seventeenth Region of the National Labor

Relations Board and which were likewise duly served. The charge was filed by Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, sometimes hereinafter referred to as the Carpenters. The complaint alleges primarily that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing certain unit work at its Roe Boulevard Kansas City, Kansas, plant and transferring that work and certain employees from the latter location to Standard Homes Company, alleged to be Respondent's *alter ego,* without prior consultation with the Carpenters which was and is the representative of the unit from which the work and employees were allegedly transferred.

The complaint further alleges that Respondent and its claimed *alter ego,* Standard Homes Company, have further violated Section 8(a)(5) and (1) by refusing to abide by the terms of Respondent's collective bargaining agreement with the Carpenters covering the Roe Boulevard unit and by other acts described in the complaint.

The complaint also alleges that Respondent acting by and through Standard Homes Company has violated Section 8(a)(1),(2) and (3) of the Act by recognizing Teamsters Local 541 (hereinafter sometimes referred to as Teamsters) as the exclusive representative of a unit of production and maintenance employees at the Standard Homes plant in Olathe, Kansas, pursuant to a collective bargaining agreement with the Teamsters at a time when the Teamsters did not represent an uncoerced majority of the employees at the instant Standard Homes Company plant.[1] Finally the complaint alleges that Respondent by other acts described in the complaint has violated Section

1. Both Standard Homes Company and Teamsters participated in the hearing.

8(a)(1),(2) and (3) of the Act. In its answer, amended at the hearing, Respondent denied the commission of any unfair labor practices. Teamsters also filed an answer to the complaint, amended at the hearing, in which it denied certain allegations of the complaint.

For reasons which will appear hereinafter, I find and conclude that Respondent and Standard Homes Company are a single employer within the meaning of the Act and that the homes prefabrication and assembly employees were removed from the Carpenters unit at Roe Boulevard and, although assigned to the Olathe plant of Standard Homes Company, continued to be a part of Carpenters Roe Boulevard unit. I further find and conclude that by unilaterally applying and enforcing the Teamsters contract at Olathe to the employees who were moved out of the Carpenters Roe Boulevard unit to work at Standard Homes Company at Olathe and by enforcing the union security provisions of that Teamsters contract to these employees, Respondent by and through Standard Homes Company has violated, and is violating, Section 8(a)(1), (2), (3) and (5) of the Act.

At the hearing all parties including the Teamsters (the Party to the Contract) and Standard Homes Company (the Intervenor) were represented by counsel. All parties were given full opportunity to examine and cross-examine witnesses, to introduce evidence and to file briefs. The General Counsel, Respondent and Standard Homes Company presented oral argument through their respective counsel at the close of the hearing; the other parties waived this right. Briefs have subsequently been filed by Respondent, Teamsters Local 541, Standard Homes Company, and, on April 26, 1973, by the General Counsel and have been duly considered.

Upon the entire record[2] in the case including the briefs, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent

The Respondent is a Missouri corporation engaged in the wholesale and retail sale of lumber and related products with its principal office and lumberyard located at 4400 Roe Boulevard, Kansas City, Kansas, one of the two locations primarily involved in this proceeding. Respondent annually sells lumber and related products valued in excess of $50,000 to customers located outside of the State of Kansas and annually has a gross volume of business in excess of $500,000. Upon the foregoing facts, which are alleged in the complaint and are admitted in Respondent's

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2. The record is hereby corrected in the following particulars:

At page 34, line 22, insert the word "may" between the words "you" and "have."

At page 42, line 7, insert the word "or outside of" between the words "within" and "the."

At page 475, line 2, delete the word "swear" and substitute "present" therefor.

At page 493, line 15, insert the word "not" between the words "are" and "going."

At page 513, line 6, the word "law" should be deleted and "clause" substituted therefor.

At page 542, line 13, substitute the word "discontinue" for the word "continue."

At page 546, line 8, insert the word "not" between the words "would" and "be."

At page 554, line 16, delete the word "and" and substitute therefor the punctuation mark "-"; and in the next line insert a "-" after the word "parties."

To make the record absolutely clear at p. 417, line 23, insert the ruling "Without objection Respondent's Exhibit No. 7 is received in evidence," a ruling reflected in my trial notes.

answer and Teamsters' answer, I find, as also admitted in these answers, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, Respondent admitted at the hearing, and Teamsters also admitted in its answer, that Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, is a labor organization within the meaning of the Act and that Teamsters Local 541 is also a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. *Background and sequence of events*

Respondent was founded in 1936, and, although a Missouri corporation, it is also qualified to do business in Kansas. One of its locations, primarily involved in this proceeding, was established on a tract of land over 13 acres in size at 4400 Roe Boulevard in Kansas City, Kansas, and was opened for business in 1952.

The founder of the firm, Mr. R. L. Sweet, passed away in 1958 and since that time his widow, Mrs. Louise V. Sweet, has been president of the corporation. Some 95% of the stock in Respondent is held in trust for Mrs. Sweet and her two daughters. The trustees are the First National Bank and the husbands of these two daughters.

At the Roe Boulevard location, the Respondent became engaged in several aspects of the lumber business including the manufacture and sale of windows, doors and room dividers and single package prefabricated homes. For a number of years a unit of Respondent's warehouse

and yard employees (e.g., lumber handlers, truckdrivers, loaders, forklift operators, stockmen, etc.) at Roe Boulevard have been represented by Teamsters Local 541, the so-called Party to the Contract, which participated in these proceedings. Certain of Respondent's inside employees at Roe Boulevard, who were engaged in the manufacturing process (e.g., millmen and prefabricated homes assemblers) had been represented for some time by the Charging Party, Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, in a separate unit. The prefabricated homes manufacturing activity was known as the Standard Homes Division of Respondent.

There came a time in 1971 when Respondent's volume of business at Roe Boulevard had developed to the point where Respondent had outgrown its facilities at that location.

The crowding at that facility was particularly noticeable in the Standard Homes production activity which was required to operate without an assembly line but utilizing several separated work locations at the Roe Boulevard site. Thus, window units were manufactured in one area and wall panels in another. Rafter cutting took place in yet a different area. Rafters and joints were stored in another space which had a dirt floor. The assembly of the completed wall panels for delivery was in a different location from that at which the panels were manufactured.

In view of this manifestly inefficient method of production and the generally cramped quarters at Roe Boulevard it was decided at a meeting of Respondent's directors in June 1971 that the Standard Homes production operation would be moved to another site. Accordingly, land was purchased and a new building was erected some 19 miles away at Olathe, Kansas, in the latter part of 1971.

The new building is clear span (no intervening walls) and provides for a continuous flow through production line whereby lumber is brought in at one end, the walls are manufactured and assembled and are carried out of the other end of the building essentially as a package ready to be sold and delivered. There is also a storage yard and a railroad spur at the Olathe facility.

The land and building at Olathe are owned by R. L. Sweet Investment Company and all the stock in that Company is held in trust for Mrs. Louise V. Sweet by the First National Bank of Kansas City, Missouri and Mrs. Sweet's same two sons-in-law, mentioned previously.

Sometime in the late summer of 1971 a "Staff Bulletin" from Mrs. Sweet dated August 5, 1971, was placed in the timecard slots of all employees at Roe Boulevard announcing the purchase and the construction of the new building at Olathe. This bulletin recited, *inter alia*, that the new plant would be occupied by "Standard Homes Company, a division of Sweet Lumber."[3]

For some time prior to 1971 there had been another separate corporation, of which Mrs. Sweet was also president, which was known as Construction Loan Company. About October 31, 1971, legal action was taken to change the name of the latter corporation to Standard Homes Company (thereby, in effect, separately incorporating the Standard Homes Division of R. L. Sweet Company).

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3. While some employees, who testified at the hearing did not recall seeing this bulletin, others testified that they did see the bulletin and it is undisputed that it was prominently rumored among the employees at Roe Boulevard in the latter part of 1971 and early 1972 that a move of the Standard Homes operation was imminent. Carpenters' Business Representative, Harding, was told in January 1972 about this impending move by Boyce, the Carpenters' steward at the Roe Boulevard plant.

Notwithstanding this incorporation of Standard Homes Company, the prefabricated homes operation continued at the Roe Boulevard plant the same as before. Thus, the prefabricated homes continued to be manufactured and shipped from that location and all production employees continued to be employed by R. L. Sweet Company and were paid with its checks. All these arrangements came to an end, however, in February 1972[4] when prefabricated homes production was halted at Roe Boulevard.[5]

Meanwhile, the plant at Olathe was so near to completion that in early January 1972, Frank H. Woodbury, an employee of Respondent, and Charles Roberts, now the assistant plant manager of Standard Homes Company, went to the Olathe site to check on the completion of the plant with the general contractor, R. E. Dunn Construction Company. Also by January 1972 lumber began to arrive

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4. After the separate incorporation of Standard Homes Company but before the prefabricated homes production was discontinued at the Roe Boulevard plant, an arrangement was arrived at whereby Respondent sold its prefabricated homes to Standard Homes Company for a price which included the value of the materials and a fixed labor cost for each unit. Much of the equipment (such as saws, tables, desks, etc.) which had been used by the Standard Homes Division were sold at their "book value" by Respondent to Standard Homes Company on November 1, 1971.

A separate office was temporarily established for Standard Homes Company office employees at Roe Boulevard and some office employees were paid on Standard Homes Company checks in January and February 1972. None of the latter were, however, shown to be unit employees.

5. Carpenters, which was the recognized representative of the employees performing the homes prefabrication work at Roe Boulevard as well as the mill employees at that location, was not notified *by Respondent* that the prefabrication work was going to be discontinued at Roe Boulevard in February 1972. The first discussion of this matter between Respondent and Carpenters, occurred ,as will appear, on February 20, 1972, when James Harding, the Carpenters' business representative spoke about it with Hatcher, Respondent's vice president in charge of production, after Harding had been informed by his steward that one of the homes prefabrication employees, Coffelt, was about to leave the Roe Boulevard plant to begin working at the Olathe location.

at the Olathe plant and four individuals (Streeter, Nicely, Brown and Kline) were hired at the site to put the lumber in place. In addition to moving lumber, these four individuals built some racks and other facilities to be used in the plant's operation.

On January 24, Aubrey Williamson, then a business agent of Teamsters Local 541, went to the Olathe site, spoke to the aforementioned four employees and obtained from them signed authorization cards for that union. Thereafter Teamsters Local 541 sought recognition as the collective bargaining representative of these employees.

On February 4, 1972, Williamson met with Eugene D. Smith, vice president of Standard Homes Company (who had previously been the vice president of Respondent and manager of the old Standard Homes Division), and with Respondent's counsel, Hoffhaus, and presented the four union authorization cards. After the signatures on these authorization cards were verified, Smith and Hoffhaus agreed to discuss a contract.

On February 8, 1972, Smith and Hoffhaus came to Local 541's office and began negotiating a collective bargaining agreement.

Further meetings were held on February 9 and 11, 1972, and a contract was executed on the latter date effective February 7, 1972, until February 2, 1975, with a provision for subsequent automatic renewal. Pursuant to this agreement Teamsters Local 541 was recognized in a production and maintenance unit at the Olathe facility of Standard Homes Company.[6]

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6. These findings in regard to the organization of the Olathe facility and the bargaining negotiations are based on the credible testimony of Williamson, which was not denied by Smith. Hoffhaus did not testify.

This agreement was a separate agreement from the same Union's previously mentioned contract covering the yard employees at Respondent's Roe Boulevard location. The latter unit was covered at the time by a contract with Teamsters Local 541, effective from April 1, 1969 to April 1, 1972, and said Roe Boulevard unit is currently covered by a contract with the same labor organization, effective from April 1, 1972 to March 31, 1975.

The date when the Olathe plant contract was executed —February 11, 1972—is prior to the 6 month statute of limitations provision set forth in Section 10(b) of the Act.

On February 11, 1972, only the four individuals previously named (outside of Woodbury and Roberts) were working at Olathe. The work they still were performing consisted of unloading lumber, moving it with forklifts, and putting up racks.[7] No production work had as yet begun at the Olathe plant.

In about the middle of February 1972 Smith began interviewing employees of Respondent at its Roe Boulevard plant and elsewhere to inquire whether they would accept employment at the Olathe plant. As will appear, several of these employees had been engaged for a number of years in the building and assembly of wall sections and other operations in the manufacture of the prefabricated housing units for Standard Homes at Roe Boulevard. A number of those interviewed including Coffelt, who was then considering retirement, and Schaffer, Phillip Fisher and John Papineau accepted the offer of employment and began working at the Olathe plant before the end of February 1972. These four employees were members of Carpenters Local 1635 while working at Respondent's Roe Boulevard location.

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7. Williamson and Smith credibly so testified.

The first prefabricated home package was produced at the Standard Homes Company Olathe plant on February 29, 1972.

In the meantime James Harding, business representative of Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, which, as previously noted, was the recognized representative of the mill and prefabricated homes unit at Respondent's Roe Boulevard location, was told by his steward, Louis Boyce,[8] on February 20, 1972, that Coffelt, who had been employed in that unit, was about to begin work at the new Olathe plant. Accordingly, Harding went to the office of Hatcher, Respondent's vice president in charge of production,[9] to inquire about (what Harding considered to be) the transfer of Coffelt from Roe Boulevard to the Olathe facility. Hatcher informed Harding that the Olathe facility was not a part of the Respondent, but was a separate Delaware corporation. Hence, said Hatcher, he and Harding had nothing to discuss. Harding, however, insisted that he would process the matter through the grievance procedures of the Carpenters contract covering the Roe Boulevard plant.[10]

Sometime in February or March of 1972 the office and plant equipment—previously used at the Roe Boulevard plant by the Standard Homes Division of Respondent and which had been sold to Standard Homes Company by Respondent on November 1, 1971,—were moved to the Olathe plant, where such assets were put to use for the same pur-

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8. Boyce was the steward of the Carpenters unit at Roe Boulevard and was also employed by Respondent at that location.

9. While Hatcher is not in charge of production at the Olathe plant, he was in charge of all production of prefabricated homes when that operation was still going on at the Roe Boulevard plant.

10. These findings are based on the credible testimony of Harding which was not denied by Hatcher.

poses and essentially in the same manner as their utilization at Roe Boulevard.

Also in February and March 1972 other employees[11] of Respondent left its Roe Boulevard plant and began working for Standard Homes Company in Olathe. These included Dial and Quick who had been members of Carpenters Local 1635 while working in the Carpenters unit at Roe plant. Others were Berry, Donica, Dale Long and Terry Long, Savage, Simpson, Vest and Webb who had been members of Teamsters Local 541 while employed by Respondent at its Roe Boulevard plant.

On March 17, 1972, Carpenters filed a grievance with Respondent complaining, *inter alia*, that Respondent had transferred bargaining unit work from Roe Boulevard to Olathe without consultation with Carpenters; unilaterally imposed a different collective bargaining agreement with less favorable wages and working conditions upon Carpenters unit employees; bypassed Carpenters in dealing directly with Carpenters unit employees about their working conditions and threatened said employees with termination if they did not transfer to the Olathe plant—all in violation of the Carpenters collective bargaining agreement then in effect at the Roe Boulevard plant. By letter dated March 22, 1972, Respondent denied the grievance on the ground that the work to which the grievance referred was then being performed by a different corporation (i.e., Standard Homes Company) and by employees of that corporation under the aegis of a collective bargaining agreement with a different union (i.e., Teamsters Local 541). In a letter dated April 19, 1972, Respondent further took the position that the grievance was not arbitrable, essen-

11. Besides Coffelt, Schaffer, Fisher and Papineau, who have already been mentioned.

tially for the same reasons Respondent had denied the grievance in its letter of March 22.

At about this same time the Carpenters contract covering the Roe Boulevard plant was nearing its termination date and Carpenters gave timely notice at the end of February 1972 that it sought to negotiate a new agreement with Respondent for the Carpenters unit at Roe Boulevard. In early April and May of 1972,[12] Respondent and Carpenters negotiated a new agreement covering the Carpenters Roe Boulevard unit. The new agreement was ratified by the unit employees about June 1, 1972, and was made retroactive to May 1, 1972 (the day after the termination of the prior contract). The new agreement is effective from the latter date until April 30, 1974.

During the negotiations for this 1972-1974 contract, Respondent's claimed transfer of Roe Boulevard Carpenters unit work to the Olathe plant was not discussed by the parties. Nor did the parties advert, in these negotiations, to the terms and conditions of employment of the former Roe Boulevard Carpenters unit employees who were by then working at the Olathe plant.

Since the spring of 1972 the prefabricated homes manufacturing operation continues to be carried on at the Olathe plant.[13] And all production and maintenance employees at the plant continue to be represented by Teamsters Local 541 under the terms of its contract for that plant.

Respondent's cessation of the prefabricated homes operation at Roe Boulevard utilizing Carpenters unit em-

12. According to the credible testimony of Harding, which was not denied by Hatcher.

13. Although utilizing door and windows which are manufactured by Respondent at the Roe Boulevard plant and sold by Respondent to Standard Homes Company.

ployees at that location and the subsequent reconstitution of that activity at the Olathe plant of Standard Homes Company without notification to, and bargaining with, the Carpenters are the principal bases of the Section 8(a)(5) allegations of the complaint. The application of the Teamsters Olathe plant contract to the former Roe Boulevard Carpenters unit employees now working at Olathe, as well as the application of that contract and its union security provisions to all production and maintenance employees at the Olathe plant, constitute the substance of the Section 8(a)(1), (2) and (3) allegations of the complaint as well as other Section 8(a)(5) allegations of the complaint.

B. *The supervisory status of Smith and Kline*

The complaint alleges that Eugene D. Smith and Walter Kline, both of Standard Homes Company, are supervisors within the meaning of the Act. The answers deny these allegations. I find and conclude, however, that both are supervisors within the meaning of Section 2(11) of the Act.

Smith is the vice president of Standard Homes Company. He is in charge of the draftsmen who draw the plans for Standard Homes Company, has the ultimate authority over production at the Olathe facility and is in charge of sales and marketing. Charles Roberts, assistant plant manager, recommends hiring and firing to Woodbury who reports on such matters to Smith. Smith hired Coffelt, Schaffer, Papineau and Fisher to work at the Olathe plant or, in any event, arranged for their employment at that location. I find, therefore, that Smith responsibly directs the activities of all employees at Olathe and has authority to hire, fire and transfer employees, all in a manner requiring the exercise of independent judgment. I conclude therefore that he is, and was at least since the hiring or transfer of Coffelt, Schaffer, Papineau and Fisher in February 1972, a supervisor within the meaning of Section 2(11) of the Act.[14]

Walter Kline, as previously noted, was one of the individuals originally hired in January 1972 to work at the Olathe plant.[15] When Coffelt, Schaffer, Fisher and Papineau took up their duties at the Olathe plant in February 1972, Kline had become a foreman.[16] As a foreman, according to the undisputed testimony of Smith, Kline has the authority to recommend hiring and firing, and, according to the admission of Smith, management has the obligation to "back up" Kline. Further, Smith admitted, Kline has enjoyed the status of non-working foreman since he, Kline, "first came down to Olathe."

I find, therefore, that Kline has been a foreman since at least February 21, 1972 (when Coffelt began working at Olathe) and has had the authority effectively to recommend hiring and firing in a manner requiring the exercise of independent judgment. I conclude, accordingly, that he has been, at least since February 21, 1972, a supervisor within the meaning of Section 2(11) of the Act.

C. *The alleged status of Standard Homes Company as an alter ego of Respondent*

The complaint alleges that Standard Homes Company is an *alter ego* of Respondent. Respondent and Team-

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14. I make these findings on the basis of the credible and undisputed testimony of Smith, Coffelt, Schaffer, Fisher, and Papineau.

15. Kline also formerly worked at Respondent's Roe Boulevard plant.

16. I make this finding on the basis of the undisputed testimony of Coffelt. Kline did not testify.

sters 541 deny that Standard Homes Company occupies such status. I find, in agreement with the General Counsel, that Standard Homes Company is an *alter ego* of Respondent and that the two companies are a single employer within the meaning of the Act.

1. Both Respondent and Standard Homes Company have essentially common ownership.

Standard Homes Company is almost entirely owned by Respondent, by Mrs. R. L. Sweet (the president of Respondent and also of Standard Homes Company) and by relatives or in-laws of Mrs. Sweet.[17]

As previously noted, about 95% of the outstanding stock in Respondent is held in trust for Mrs. Sweet, and her two daughters, Marilyn S. Kiene and Athelia S. Clingan. The trustees are Mrs. Sweet's sons-in-law, Melvin H. Clingan, Ralph Kiene and the First National Bank of Kansas City.

2. Respondent and Standard Homes Company have a number of common officers. Thus, Mrs. Sweet is the president of both companies as well as the treasurer of Respondent. Melvin H. Clingan (her son-in-law) is the secretary of Respondent and is also the secretary and assistant treasurer of Standard Homes Company, George E. Fischer is a vice president (controller) of Respondent and assistant secretary of Standard Homes Company.

3. The directors of Respondent and Standard Homes Company were not shown. However, it is undisputed that

17. Thus, there are 10,000 outstanding shares of stock in Standard Homes Company. Of these shares Respondent owns 8,950 (89.5%). Mrs. Sweet owns 150 shares; her two daughters Marilyn S. Kiene and Athelia S. Clingan, 150 each; one son-in-law, Melvin H. Clingan, 150; her four minor Kiene grandchildren, 150 altogether; —for a total of 9%. Therefore, 98.5% of the stock in Standard Homes Company is owned or controlled by Respondent and members of Mrs. Sweet's family.

the directors of Respondent are elected by the trustees of 95% of Respondent's corporate stock. And, as noted, two trustees are sons-in-law of Mrs. Sweet. Since Respondent and members of the Sweet family own 98.5% of the Standard Homes Company, I conclude that Respondent and the Sweet family also elect the directors of Standard Homes Company.

4. Mrs. Sweet is actively engaged in overseeing both corporations. She has an office on Roe Boulevard and another at Olathe. She keeps office hours at Roe Boulevard 6 days per week and assists in sales promotion at Olathe every Sunday. During the week, Mrs. Sweet is in contact with Eugene D. Smith, the vice president of Standard Homes Company and its manager, everyday—in person or by telephone—and Mrs. Sweet must approve decisions of Smith particularly major purchases recommended by him. Mrs. Sweet signs all the paychecks[18] for Standard Homes Company employees.[19]

5. Respondent and Standard Homes have a commonly controlled labor relations policy.

As noted, Mrs. Sweet is president of both companies.

A "Staff Bulletin" from Mrs. Sweet, dated August 24, 1972, was issued to all employees of Respondent and Standard Homes Company announcing that all offices and yards of Respondent and Standard Homes Company including the exhibition houses of Standard Homes Company would be closed for all 3 days of the Labor Day weekend September 2, 3 and 4, 1972.

18. These findings are based on the admissions of Mrs. Sweet.

19. In her testimony Mrs. Sweet also referred to the product of Standard Homes Company as "our home."

Hoffhaus, who ably represented Respondent at the hearing, also represented it in denying Carpenters demand for arbitration in April 1972. Hoffhaus also participated in the discussions and negotiations in early February 1972 between Teamsters 541 and Standard Homes Company which resulted in the recognition of Teamsters by Standard Homes Company and the execution of a contract between Teamsters and Standard Homes Company which, by its terms, covers a unit of the production and maintenance employees at the Olathe plant.[20]

Officials of Respondent sent employees to see Smith at Respondent's Roe Boulevard plant to discuss the possibility of their working at the Olathe plant. Thus, Hatcher, Respondent's vice president in charge of production at Roe Boulevard, who also negotiated and signed the 1972 Carpenters contract for that location (and admitted handling Respondent's labor relations for a number of years previously) summoned or accompanied employees Schaffer and Fisher to their interviews with Smith. When Schaffer originally turned down the Olathe opportunity due to the low wage offer by Smith, Hatcher told Schaffer he might get another call. Schaffer did get another call from Smith and Schaffer was offered and accepted a higher hourly rate at Olathe than he was first offered. Roe Boulevard foreman, Don Walker, sent employee Fisher to his interview with Smith. Coffelt, Schaffer, Fisher and Papineau all credibly testified, and I find, that Smith told them, when he spoke to them at the Roe Boulevard plant in February 1972, that they would retain their seniority from their em-

20. Lowe, who capably represented Standard Homes Company at the hearing, was not present at these negotiations. I am constrained to observe, in passing, that I was favorably impressed by the high degree of professional competence and courtesy demonstrated by all counsel who appeared at the hearing.

ployment with Respondent at least insofar as vacations at Standard Homes were concerned.[21]

6. The initial complement at Olathe at the time production began on February 29, 1972, consisted of employees who had just been released from Respondent. Thus, of some 18 production and maintenance employees working at Olathe by the end of February 1972, some 14 had formerly been employed at Roe Boulevard where they had been represented in the Carpenters unit by Carpenters or had been represented by Teamsters Local 541, apparently in the latter's unit at the Roe Boulevard plant.[22]

7. Smith admitted that all supervisors at Olathe had formerly worked at Respondent's Roe Boulevard plant, although he further stated that some of the Olathe leadmen had not been part of supervision at Roe Boulevard.

8. As will appear, Standard Homes Company is producing essentially the same product as was produced when the prefabrication operation was located at Roe Boulevard.

9. There continues to be a certain measure of product integration between the Olathe and Roe Boulevard plants in that the window and door units installed by Standard Homes Company at Olathe are manufactured at Roe Boulevard and sold to Standard Homes Company by Respondent. The window and door units utilized by the old Standard Homes Division were also manufactured at Roe Boulevard.

21. Kline, whom I have found to be a supervisor, told Papineau about March 1972 that Papineau could be transferred from Olathe to another plant of Respondent at Lee's Summit in Missouri.

22. At least eight of this number had been represented by Teamsters Local 541 at Roe Boulevard. This figure accords with information given to Teamsters Local 541 representative, Williamson, by Dale Long, Teamsters' steward at Roe Boulevard, then about seven of Teamsters members at Roe Boulevard would be laid off as the result of Standard Homes leaving that location to go to Olathe.

10. All purchasing for Standard Homes Company and Respondent is performed by Respondent although Standard Homes Company pays Respondent for this and other accounting services. As previously mentioned, George E. Fischer is Respondent's controller as well as the assistant secretary of Standard Homes Company.

11. A considerable amount of office and factory equipment was sold by Respondent to Standard Homes Company on or about November 1, 1971, at the equipment's "book value" which I conclude in numerous instances was substantially less than its actual value. For example, some 7 saws of various descriptions were sold for $1 each, 12 desks were sold at the same unit price as were 7 file cabinets, 6 Friden calculators and 2 Marchant calculators. Eleven typewriters, mostly Royal, were also sold to Standard Homes Company by Respondent for $1 each. This equipment, particularly the shop items (such as saws, tables, etc.) continued to be used by Respondent's employees at Roe Boulevard until February 1972 and is now in use at Olathe.

12. Finally, Standard Homes Company is still held out to the public as a division of Respondent in the local telephone "Yellow Pages" for 1972[23] and 1973.[24] In newspaper advertising as recently as May 7, 1972, Standard Homes Company was also held out to the public as a subsidiary of Respondent. The Standard Homes advertising brochure for 1972 also recites that Standard Homes is a subsidiary of Respondent.

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23. The cut-off date for placement of advertising in the Yellow Pages for 1972 was October 13, 1971.

24. The cut-off date for placement of advertising in the Yellow Pages for 1973 was October 13, 1972.

In view of all the foregoing, I find and conclude that Respondent and Standard Homes Company are, and were at all times material hereto, a single employer within the meaning of the Act.[25]

D. *The appropriate unit; are the Standard Homes Company prefabrication employees at Olathe a part of the Carpenters unit at Roe Boulevard or have they been merged into a plant-wide production and maintenance unit at the Olathe plant?*

Having concluded that Respondent and Standard Homes Company are a single employer within the meaning of the Act, it follows that all employees of the Olathe plant are employed by the same employing entity as the employes who continue to work at the Roe Boulevard plant.

The pertinent question, however, insofar as these proceedings are concerned, now becomes whether the homes prefabrication and assembly employees—who were represented in the Carpenters unit at Roe Boulevard—remain a part of that unit (or have become an accretion to it) notwithstanding the fact that such employees are now located at the Olathe plant. I conclude that the instant employees continue to be—or are an accretion to—the Carpenters unit at Roe Boulevard.[26]

Coffelt, Schaffer, Fisher and Papineau all credibly testified, and I find, that, since they have begun their employment at Olathe, they have performed the same work, using

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25. E.g., *Macke Laundry Service Company of D.C. et al.*, 190 NLRB No. 1; *Manitowoc Shipbuilding Inc., et al.*, 191 NLRB No. 137.

26. I do not reach or decide the question of whether the yard employees, forklift loaders, etc., at Olathe are an accretion to the Teamsters unit at Roe Boulevard. That question was not presented in the complaint nor was it litigated at the hearing.

the same tables, jigs and tools, as they did when employed[27] at the Roe Boulevard plant.[28] This work is also performed for many of the same customers (particularly builders) who used to purchase the prefabricated homes when the prefabrication and assembly operation was located at Roe Boulevard.

This work also continues to be performed under the supervision of Smith who was in charge of the old Standard Homes Division of Respondent at Roe Boulevard, albeit Smith did not then directly supervise the production operation. Also, as noted, Mrs. Sweet is president of Standard Homes Company as well as Respondent.

Further, as already found, the former Roe Boulevard employees, now employed at Standard Homes, were assured that their seniority with Respondent would be continued at Olathe at least insofar as vacations at Standard Homes are concerned.

While there is some evidence that employees are interchanged in what Smith described as a "fairly standard" manner in the production operation at Olathe (i.e., utilizing yard employees to do some production work and vice versa), Smith gave only one specific example[29] of this and

27. Coffelt retired at the end of August 1972. I also conclude that Dial and Quick, two other former members of Local 1635 who terminated their employment with Respondent in February 1972 and began work for Standard Homes Company in the same month, also performed the same work at both locations. I reach this conclusion based on the fact that each has the same job classification with Standard Homes Company as he did with Respondent (i.e., assembler and rafter cutter, respectively).

28. Smith conceded at the hearing that the work is essentially the same, requiring the same skills. The only difference cited by Smith is that the product must now conform precisely to the drawing, a policy which did not obtain at Roe Boulevard.

29. Williamson, the then Teamsters representative, also saw one or two of the four employees, whom he originally signed up, doing production work after production began.

conceded that a majority of the employees are assigned to one particular job at which they are most efficient. In this connection it is also important to note that, in addition to hiring six Carpenters unit prefabrication employees from Roe Boulevard to work in Olathe in February 1972 (Coffelt, Fisher, Schaffer, Papineau, Quick and Dial), Standard Homes Company also hired Duxbury and Fitzpatrick to work at Olathe in March 1972. These last two employees were former members of Carpenters Local 1635 at Roe Boulevard, but had left Respondent's employ there in 1971 and 1970 respectively.[30] They were hired for assembly work at Olathe. Further Coffelt credibly testified, and I find, that he never saw Brown, Streeter and Nicely (i.e., three of the four individuals originally hired at Olathe in January 1972) performing production work.[31]

I conclude, based on the foregoing, that the prefabrication and assembly employees now working at Olathe continue to be—or are an accretion to—the Carpenters unit at Roe Boulevard. This conclusion also rests on my subsidiary findings, *supra*, in support of my conclusion that Respondent and Standard Company are a single employer within the meaning of the Act including, *inter alia*, the integration of operations whereby Respondent's mill employees continue to manufacture the window and door units for the prefabricated homes assembled at Olathe just as such mill employees manufactured the same components when the prefabrication and assembly operation was carried out at Roe Boulevard.

30. Duxbury had been an apprentice panel assembler and Fitzpatrick an auto nailer operator at Roe Boulevard.

31. This testimony is not necessarily inconsistent with that of Williamson, *supra*, who only saw "one or two" of these four employees working on the production line.

I am not persuaded in all the foregoing circumstances that there has been sufficient interchange of the production, maintenance and yard employees at Olathe to disestablish the integrity of the Standard Homes Company prefabrication and assembly employees with the Carpenters unit at Roe Boulevard. For under Board law, the perimeters of an otherwise appropriate unit—here one founded on bargaining history[32] and a Board certification (according to the language of the 1970-1972 contract between Carpenters and Respondent)—will not be washed away merely by general testimony that interchange has occurred into and out of such a unit. What is required to defeat the appropriateness of such a unit on this basis is a demonstration that the amount of such interchange has been significant and such a showing would normally require evidence of the regularity and identity of individual employees who have participated in such interchange.[33]

I do not find such a demonstration present in this record.[34]

I further find, based upon the prior and current collective bargaining agreement between Carpenters and Respondent, and the apparent Board certification, both covering the Boulevard unit, that Carpenters was, at all times relevant hereto, and remains, the majority representative

32. Where the same employees did essentially the same work using the same equipment when members of the Roe Boulevard Carpenters unit.

33. In fact a stipulation entered into by the parties, styled General Counsel's Exhibit No. 8, sets forth separate job assignments for the Olathe plant employees which clearly place such employees in homes assembly (Carpenters unit) work (e.g., "Ray L. Dial—assembler of panels") or non-Carpenters unit warehouse work (e.g., "David N. Nicely—lift truck operator").

34. See *Big Y Supermarkets*, 161 NLRB 1263, 1267-1268; cf. *American Cyanamid Company*, 131 NLRB 909, 910.

of that unit including the homes prefabrication and assembly employees now working at the Standard Homes Company plant in Olathe.[35]

E. *The alleged Section 8(a)(2) violations*

The complaint alleges, as amended at the hearing, that Respondent by and through Standard Homes Company unlawfully recognized Teamsters Local 541 as the exclusive representative of the production and maintenance employees at the Olathe plant of Standard Homes Company on February 4, 1972, at a time when Teamsters did not represent an uncoerced majority of the Olathe plant employees and when a substantial and representative complement was not yet employed at the plant. Also alleged as violative of Section 8(a)(2) and (1) of the Act was the subsequent execution of the collective bargaining agreement between Teamsters and Standard Homes Company on February 11, 1972, effective from February 7, 1972. And

35. While some of the latter employees subsequently joined Teamsters, I conclude they would not have done so but for Respondent's unfair labor practices. Of the employees hired to do homes prefabrication and assembly work at Olathe, six were members of Carpenters Local 1635 and had immediately prior thereto been employed in the Roe Boulevard Carpenters unit—Coffelt, Fisher, Schaffer, Papineau, Dial and Quick (although Quick and Schaffer were on layoff in February 1972); two more were former employees at Roe Boulevard—Duxbury and Fitzpatrick, where they had been members of Carpenters Local 1635. Only five subsequently hired at Olathe to do homes prefabrication and assembly work (as of September 1972, the last hiring record shown at the hearing) were not demonstrated to have been former members of the Carpenters or one of its locals—Altman, Brown, Michael, Smith and Strausbaugh. The first two of these last five who were hired, Smith and Michael, were not hired until March 21, 1972.

Pursuant to the union security provisions of the Carpenters Roe Boulevard contract (Article II (c)) employees may designate a specific local of the Carpenters in their dues check-off authorizations—a privilege obviously exercised by the foregoing individuals who belonged specifically to Local 1635.

to remedy these alleged unfair labor practices the General Counsel asks to have me recommend an order setting aside the instant contract.

For its part, Respondent contends, that the recognition of, and execution of a contract with, the Teamsters at the Olathe plant cannot be found to be unfair labor practices, if only for the reason that said events occurred prior to the 6 month statute of limitations period set forth in Section 10(b) of the Act. I have already found that these events did, in fact, occur prior to the Section 10(b) period.[36]

I agree with Respondent's contention. Since the recognition and contract execution occurred more than 6 months prior to the filing and service of the charge in the instant case, the circumstances surrounding these matters cannot be utilized to set aside the contract. Section 10(b) so prescribes.[37] Nor does the possibility that such a contract would not serve as a contract bar to a representation petition under principles enunciated by the Board in its *General Extrusion Company, Inc.*,[38] decision serve to invalidate such an agreement in an unfair labor practice case, where the agreement was entered into prior to the Section 10(b) period.[39]

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36. I conclude that the 6-month period of limitation began on or about February 19, 1972, a date 6 months preceding the filing and service of the charge. Even if said period were to begin on February 18, 1972 (to account for the shortness of the month of February) this would not alter my conclusion because the events in question occurred on February 11 or earlier.

37. *Local No. 1424, IAM* v. *N.L.R.B.*, 362 U.S. 411.

38. 121 NLRB 1165.

39. *The Kroger Company*, 165 NLRB 872. I am not impressed with the General Counsel's argument in his brief that the Section 10(b) period should begin with the hiring of Coffelt on February 21, because, says the General Counsel, Coffelt was the first employee whose rights were unlawfully affected by the contract.

(Continued on following page)

Altogether different questions are, however, posed by the further allegations of the complaint that said agreement was *enforced* in violation of Section 8(a)(1), (2) and (3) of the Act with respect to employees at the Standard Homes Company Olathe plant and that Teamsters was unlawfully assisted by officials of Standard Homes Company at a time when Teamsters did not represent an uncoerced majority of employees at said plant. For, as will be discussed, said agreement, including its union security provisions, was applied and enforced to the homes prefabrication and assembly employees at Olathe and said assistance occurred at times clearly occurring within the Section 10(b) period. And, as already found, Teamsters Local 541 did not represent these employees (even though said employees had become a part of the complement at the Olathe plant) since, despite their assignment to Olathe, such employees continued to be included in the Carpenters unit at Roe Boulevard, as also already found.

I find, for reasons explained hereafter, that Teamsters never represented an uncoerced majority of this group of employees at Olathe nor the unit of which they were, and are, a part. Rather Carpenters, was, and is, the exclusive bargaining representative of these homes prefabrication and assembly employees of Standard Homes Company.

Footnote Continued—

The General Counsel's argument rests on *Southern California District Council of Laborers* v. *Ordman*, 318 F. Supp. 633, which is distinguishable on its facts. There, no employees were hired when the complained of contract was executed and the court held that the Section 10(b) period began with the hiring of the first employees whose rights were affected by the contract. Here three, or more probably four, employees (if Kline was not then a supervisor) were hired before the execution of the contract. The rights of all three or four would have to be "affected" by the contract, which covered their terms and conditions of employment if, as the General Counsel says, that contract was executed in violation of Section 8(a)(1) and (2) of the Act and none could lawfully be deprived of an opportunity to file a charge with the Board so alleging.

As previously found, the only individuals working at the time the contract was executed on February 11, 1972, were four who were engaged primarily in unloading lumber, in moving it on forklift trucks and in making racks. Production did not begin until February 29, i.e., a date by which some six Carpenters unit employees from Roe Boulevard—who had performed homes prefabrication and assembly work at Roe Boulevard—resumed these same duties at the Olathe plant; the first, Coffelt, having begun work there on or about February 21.

It is undisputed that the Teamsters contract, with its lower wage rates and different benefits, was applied to the prefabrication and assembly employees upon their employment at Olathe.[40]

I further conclude that this contract's provisions recognizing the Teamsters as the bargaining representative of the instant prefabrication and assembly employees and requiring membership in Teamsters as a condition of employment were enforced as to these employees. Thus, Smith advised Coffelt on about February 17, 1972, and Papineau and Fisher a few days later, that the employees at Olathe would be represented by one union, the Teamsters.[41] The contract which had already been entered into contains a union security provision requiring membership in the Teamsters as a condition of employment and Coffelt, Fisher and Papineau did, in fact, subsequently join that labor organization.

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40. Except for Fisher during the first 2 days of his employment there. He credibly testified that he worked "unofficially" at Olathe for 2 days, at the Roe Boulevard Carpenters hourly rate, setting up tables and lining up machinery. Thereafter he was paid the Teamsters Olathe leadman rate which was less.

41. Coffelt, Fisher and Papineau credibly so testified and Smith did not deny it.

I am not persuaded that the fact that Kansas is a so-called "Right to Work" state exculpates Respondent from the charge that it enforced the union security provisions of the Teamsters agreement. That is, the argument goes, since Kansas has a "Right to Work" law union membership must be considered voluntary. I reject this argument on the simple basis of the fact of Smith's foregoing admonition to these three employees that there would be one union at Olathe—the Teamsters.[42] If Respondent had intended to rely on the voluntary character of union membership under such a law there would have been no reason for Smith to have advised the employees that the Teamsters was to be the only union at Olathe.

However, by making the statement that Teamsters was the only union, in the context of an employment or transfer interview, the implication was clearly left in the minds of the employees that this was the union which they had best join.

After these employees had begun work at Olathe, further efforts were expended by Respondent to have them join the Teamsters. Thus, as has already been mentioned in part, Supervisor Kline spoke to Papineau in March 1972 about the matter of Papineau's joining that union. To Papineau's statement that he, Papineau, thought that Kansas had a "Right to Work" law, Kline retorted that Respondent also had a plant in Missouri (which does not have a "Right to Work" law) and there would be nothing to stop Respondent from transferring Papineau to that location. Papineau subsequently joined the Teamsters.[43]

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42. In view of Smith's failure to deny these admonitions, I attach no weight to his general testimony that he did not enforce that clause.

43. Papineau credibly testified to this conversation. Kline did not testify.

Smith also offered to pay Fisher's initiation fee of $100 to the Teamsters several weeks after Fisher began work at Olathe. Fisher declined the offer and paid the fee himself when he later joined.[44]

The application and enforcement of this contract to these prefabrication and assembly employees would not be unlawful if the work in which they were to be engaged would have been an accretion to the unit work already being performed at Olathe.[45] But the work being performed at Olathe at the time the contract was executed did not include production and assembly of prefabricated homes. Nor was such production and assembly begun at Olathe until the homes prefabrication and assembly employees from the Carpenters unit at Roe Boulevard were assigned to work at Olathe on and after February 21, 1972. But, as I have found, these prefabrication and assembly employees continue to be—or are on accretion to—the Carpenters unit at Roe Boulevard despite their assignment to the Olathe plant subsequent to the execution of the Olathe Teamsters contract. Hence, that contract when applied and enforced with respect to these employees has been applied to employees in a different unit, not represented by the Teamsters.

The application of a collective bargaining agreement with one labor organization (here Teamsters) and enforce-

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44. Fisher credibly so testified. Smith stated in relation to this offer to pay the fee that he, Smith, "sort of left him [Fisher] with the impression that I [Smith] would check on it and see," but he later told Fisher that "the office" had told Smith that it could not pay the initiation fee.

In offering this somewhat different version in his testimony Smith looked at me with a resigned expression on his face. To the extent that the versions differ, I credit Fisher.

45. E. g., *The Great Atlantic and Pacific Tea Company (Family Savings Center)*, 140 NLRB 1011.

ment of that contract's union security provisions to employees in a different unit represented by a different labor organization (here Carpenters) is violative of Section 8(a)(1), (2) and (3) of the Act,[46] even though the contract thus applied and enforced was entered into prior to the Section 10(b) period.

I therefore find that Respondent through Standard Homes on and after February 21, 1972, violated Sections 8(a)(1),(2) and (3) of the Act by applying and enforcing the Teamsters Olathe contract to the homes prefabrication and assembly employees who were then, and still are, a part of the Carpenters unit at Roe Boulevard.[47]

And in reaching the conclusion that Respondent through Standard Homes Company unlawfully assisted Teamsters in violation of Section 8(a)(1) and (2) of the Act, I rely not only on the undisputed application of Teamsters contract to the instant production employees but also upon Smith's aforedescribed statements to Fisher and Papineau in February 1972 and Smith's and Kline's aforementioned remarks to Fisher and Papineau in March 1972,[48] whereby I have concluded that Respondent enforced the union security provisions of this contract.

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46. *Wolfer Printing Co., Inc*, 145 NLRB 695; *White Front Stores, Inc.*, 166 NLRB 175.

47. See *Sewanee Coal Operators Association et al.*, 167 NLRB 172, 181-182, enf. denied, *sub nom. Tennessee Products, Chemical Corporation* v. *N.L.R.B.*, 423 F. 2d 169, C.A. 6. The Board decision is binding upon me. *Prudential Insurance Agents*, 119 NLRB 768, reversed on other grounds, 361 U.S. 477. Moreover, I am constrained to observe that the Sixth Circuit's disagreement with the Board in the *Sewanee* case stemmed mainly from its disagreement with the Board's determination in the underlying representation case as to the identity of the majority representative of the unit in which, the Board found, the contract therein had been unlawfully entered into.

48. See *Sheraton Kauai Corporation*, 177 NLRB 25, enf. 429 F. 2d 1352, C.A. 9.

F. *The Section 8(a)(5) allegations of the complaint*

On February 20, 1972, the day before the first of these employees (Coffelt) reported for work at Olathe, Carpenters Representative Harding sought to discuss the matter of "the transfer" of the instant employees with Hatcher, Respondent's vice president in charge of production (Hatcher was also Respondent's principal bargainer in the Carpenters unit contract negotiations in 1972 and admitted that he had handled Respondent's labor relations prior to that time). Hatcher told Harding there was nothing to discuss because the Olathe plant was a "wholly owned Delaware corporation and was not part of Sweet Company."

To the extent that Hatcher's response may have intended the meaning that Respondent was contending that Standard Homes Company was a separate employer, I have already rejected this contention in my conclusion that Respondent and Standard Homes Company are a single employer within the meaning of the Act. I have also already found that the homes prefabrication and assembly employees continue to be a part of—or are an accretion to—the Carpenters unit at Roe Boulevard notwithstanding the present assignment of these employees to the Olathe plant. I have further found that the Teamsters contract at Olathe was unlawfully applied and enforced as to these employees after they began work at the Olathe plant.

In these circumstances, it follows that Respondent by Hatcher, on February 20, 1972, refused to bargain with respect to the wages, hours and other terms and conditions of employment with Carpenters, the recognized representative of the unit in which these employees were employed. It likewise follows that the application of the Teamsters Olathe contract, with its lower wage rates and different benefits, was a unilaterial change by Respondent, through

Standard Homes Company, in the terms and conditions of employment of these employees. Respondent continued its refusal to bargain with Carpenters about these matters by denying Carpenters grievance in March 1972 and also by denying Carpenters request for arbitration in April 1972, both of which dealt, *inter alia*, with the same unilateral changes in the terms and conditions of employment of these employees. And the prefabrication and assembly employees at Olathe continue to work under the unilaterally changed terms and conditions of employment imposed upon them by the unlawful application to them of the Teamsters Olathe contract.

In so refusing to bargain with Carpenters and unilaterally changing the terms and conditions of employment of these employees, I find that Respondent itself, and Respondent by and through Standard Homes Company, on and after February 20, 1972, has violated and continues to violate Sections 8(a)(5) and (1) of the Act.[49]

In reaching this conclusion I have carefully considered each of the defenses offered by Respondent and Teamsters at the hearing and in their briefs but reject them.

1. *The defense of constructive notice.* It is argued that by placing a notice to each employee in the timecard rack at Roe Boulevard in August 1971 informing the employees of the expected move by Standard Homes to Olathe, as well as through the rumors about the move which were rife at the Roe plant thereafter, Carpenters was constructively notified of the move and should have taken prompt action to bargain about it. I disagree.

It is clear the Carpenters was never formally notified of the move nor offered a reasonable opportunity to bargain about that move or any consequence from it upon the

49. See *N.L.R.B.* v. *Katz*, 369 U.S. 736.

terms and conditions of employment of the Carpenters unit employees.

But even if it could be held that notice *to the employees* of the move and the aforementioned rumors somehow stand on the same footing as a formal notice to the Union of an opportunity to bargain, I would still disagree that Carpenters was thereby given an adequate notice of the opportunity to bargain on this matter. For there is no indication in the notice itself that the move would result in any change in the terms and conditions of employment of Carpenters unit employees. The notice merely recited in this regard that the "new plant [at Olathe] will be occupied by Standard Homes Company, a division of Sweet Lumber," and no mention was made of a separate corporation at the Olathe location. Since the production employees of "Standard Homes Company, a division of Sweet Lumber" were already a part of the Carpenters unit at Roe Boulevard, the notice provided no basis for any expectation that such employees would not continue to be a part of that unit after the move of the "division" to Olathe.

Nor does it appear that the separate incorporation of Standard Homes Company on November 1, 1971, was made known to the Carpenters or the Carpenters unit employees. In fact, despite the existence of this separate corporation, as of November 1, 1971, the Standard Homes production operations continued at Roe Boulevard from November 1, 1971, into February 1972 and the production employees continued to be paid on Respondent's checks, as already found.

I conclude rather that the matter was timely raised by Harding's unsuccessful effort to consult with management the day before Coffelt, the first Carpenters unit employee to go to Olathe, began work there.

2. *Exercise of the prerogative of management rights under the management rights clause of the Carpenters contract.* While management obviously has the right to make management decisions under a "management rights" contract provision this does not permit management to avoid the obligation to bargain about any change in the terms and conditions of employment which might result from such management decisions. While it is true that a labor organization may enter into an agreement in which it waives the right to bargain about mandatory subjects of bargaining (wages, hours, etc.) such a waiver must be "in clear and unmistakable" language and will not readily be implied.[50] I find no clear and unmistakable language in the management rights provision of the applicable contract herein whereby Carpenters could be deemed to have waived the right to bargain over reassignment of unit employees and unit work at lower wage rates and different benefits than they were already receiving.

3. *The employees themselves agreed to the assignment at Olathe.* Since by obtaining the employees' agreement to the assignment, Respondent thereby bypassed their bargaining representative, this defense need not detain us long. Bypassing of the bargaining representative in a situation wherein an employer refuses to bargain with the employees' exclusive representative about these same matters is the very practice inveighed against by the Supreme Court in *Katz, supra.*

4. *The Carpenters failed to raise the question of the relocation of bargaining unit work and unit employees to Olathe when Carpenters bargained with Respondent in the spring of 1972 for a new contract covering the Carpenters Roe Boulevard unit.*

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50. E.g., *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506; *The Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746, C.A. 6, cert. denied, 376 U.S. 971.

It is undisputed that no mention was made by Carpenters or Respondent of the matter of the relocation of the Standard Homes prefabrication and assembly employees and their work to the Olathe plant, when Carpenters and Respondent bargained in the spring of 1972 for a new agreement covering the Carpenters unit at Roe Boulevard.

However, I do not believe that Carpenters' failure to bring up the matter during these negotiations absolved Respondent of any obligation to bargain about it. For Carpenters is not required to engage in a futile act. The door to bargain on this subject had already thrice been closed in Carpenters' face before the spring 1972 negotiations had begun—when Hatcher refused Harding's request to discuss the matter on February 20, 1972, after the first Carpenters unit employee, Coffelt, was about to begin work at Olathe; again when Carpenters grievance over this matter was rejected by Respondent in March 1972 and for the third time when Carpenters request to arbitrate the issue was also rejected by Respondent in April 1972.

5. *The fact that the Carpenters contract coverage was explicitly limited to the Roe Boulevard "plant."* The agreement, which was in effect at the time of the relocation of the homes prefabrication and assembly work (and the employees performing that work) from Roe Boulevard to Olathe, was the Carpenters Roe Boulevard contract which was effective from June 1, 1970, to April 30, 1972.

The aforementioned management rights clause (Article XIX) speaks of the "management of [this] plant" in the singular. But at the time this agreement was entered into on June 30, 1970, all of the instant work and employees were located at the Roe Boulevard plant.

In these circumstances, I am not persuaded that this language precludes Carpenters from bargaining over work

or employees subsequently removed from the "plant" to another location, again, as *supra*, in the absence of "clear and unmistakable" language to the contrary. For, to hold otherwise would mean that an employer operating under a collective bargaining agreement containing such language could avoid that agreement and its bargaining obligation entirely, merely by a unilateral shutdown of the "plant" and removal of all plant work and employees to a location only one city block away.

I accordingly, conclude that Respondent itself and Respondent by and through Standard Homes Company have violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Carpenters and by unilaterally changing the terms and conditions of employment of these employees after their assignment to Olathe.[51]

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51. While I am satisfied that these violation findings soundly rest on my other findings and the *Katz* decision, *supra*, I am constrained to observe that the General Counsel has also established a violation of Section 8(a)(5) and (1) on a separate theory which will appear, *infra*.

I make this alternative finding in the event the Board or the Courts disagree with my conclusions—that Respondent and Standard Homes Company are a single employer within the meaning of the Act, that the homes prefabrication and assembly operations at Olathe remain part of, or are an accretion to, the Carpenters unit at Roe Boulevard and that the Teamsters Olathe contract was unlawfully applied and enforced as to said employees.

For if the Respondent and Standard Homes are separate employers within the meaning of the Act and there has been no accretion and the Teamsters contract was lawfully applied and enforced as to the instant employees, I would nonetheless conclude on the basis of my other findings *supra*, in this section of my decision, that Respondent discontinued its prefabrication and assembly Carpenters unit work at Roe Boulevard, on and after February 20, 1972, without giving Carpenters an opportunity to bargain about the effects of this action and has thereby violated and continues to violate Section 8(a)(5) and (1) of the Act. *Royal Aluminum Inc.*, 190 NLRB No. 99.

(Continued on following page)

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent and Standard Homes Company, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Footnote Continued—

All the elements of proof of this violation have already been found with the possible exception of "substantial impact" or "substantial detriment" to the employees who left the homes prefabrication and assembly operation at Roe Boulevard to work at Olathe. I conclude that this detriment is established by the fact that—if it is assumed that Standard Homes Company is a separate employer—at least six employees in the Carpenters Roe Boulevard unit lost their jobs with Respondent. See *Royal Aluminum, Inc., supra.*

I am not persuaded that this loss of jobs can be said to be mitigated by the voluntary acceptance of work at Olathe by these employees. For it is manifest that such voluntary acceptance was obtained in circumstances involving the bypassing of their bargaining representative. See *Katz, supra; Royal Aluminum, Inc., supra.*

Moreover, while there is testimony by Mrs. Sweet that the Carpenters unit employment in mid-February 1972 (presumably before the move) stood at 15 and continued to be 15 in July 1972 (after the move) this provides no assurance that the six who went to Olathe would have remained in the unit. For there is no showing that all were qualified to perform the more highly skilled Carpenters unit mill work (e.g., manufacture of window and door units) which is still being carried on at Roe Boulevard nor was there any assurance that they would have even found employment elsewhere in the plant (Williamson, the representative of Teamsters was told by Dale Long, as previously found, that 7 employees from the Teamsters unit at Roe Boulevard were to be laid off as the result of Standard Homes moving from that location). Even if my finding that Standard Homes Company and Respondent are a single employer is sustained—but my accretion and unlawful contract application findings reversed—this detriment is also established by the loss of hourly wages in the amount of $.56½ per hour (the difference between the journey-

(Continued on following page)

V. The Remedy

Having found that Respondent itself and by and through Standard Homes Company has engaged in certain unfair labor practices, I shall recommend that both companies cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since I have concluded that Respondent itself and by and through Standard Homes Company violated Section 8(a)(5) and (1) of the Act in certain respects, I shall recommend that Respondent and Standard Homes Company recognize Carpenters as the collective bargaining representative of the homes assembly and prefabrication employees now working at Olathe as a part of the Carpenters unit of Respondent at Roe Boulevard and that Respondent and Standard Homes bargain collectively upon request with Carpenters as the exclusive representative of the in-

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Footnote Continued—

men carpenters rate which these employees received at Roe Boulevard, $5.06½ per hour, and the highest paid leadman rate, $4.50 per hour, under the Teamsters Olathe contract) and by the potential loss of retirement benefits under the Carpenters contract. See *Cities Service Oil Company*, 158 NLRB 1204. Hatcher testified that the mill and homes prefabrication and assembly employees had all been paid at the journeyman ($5.06) rate. Coffelt, Schaffer and Fisher also testified that they had received this rate (Coffelt with an increment) when working at Roe Boulevard.

I find inapposite, on its facts, the Court decision in *Fraser and Johnston Co.* v. *N.L.R.B.*, _____ F. 2d _____, No. 71, 1438, November 29, 1972 (C.A. 9), relied on in Respondent's brief, wherein the Court refused to enforce a bargaining order of the Board to remedy a somewhat similar violation. There, unlike here, the entire plant was shut down at one location and moved to another. Here, only a part of the Carpenters unit has been moved and the remainder of the unit clearly continues in existence at Roe Boulevard.

If the Board or Courts uphold my violation findings based on *Royal Aluminum, supra,* but reverse all my other violation findings, I would recommend the remedy found appropriate in *Royal Aluminum,* rather than the remedy which I shall recommend.

stant homes prefabrication and assembly employees as a part of that unit.

Having found that Respondent by and through Standard Homes Company violated Section 8(a)(1),(2) and (3) of the Act by rendering unlawful support and assistance to Teamsters Local 541 at the Olathe plant and enforcing that labor organization's union security agreement, I shall recommend that Respondent and Standard Homes Company withdraw recognition from Teamsters Local 541 as the representative of the homes prefabrication and assembly employees now working at Olathe, both until they have complied with the bargaining order described *supra*, and unless and until Teamsters Local 541 has been certified by the Board as the exclusive bargaining representative of the employees in the unit found appropriate, *infra*.

I shall also recommend that Respondent and Standard Homes Company cease applying the provisions of Teamsters Olathe contract to said employees.

Having found that Respondent unlawfully applied and enforced the union security provisions of said contract to the said employees, in violation of Section 8(a)(1),(2) and (3) of the Act, I shall further recommend that Respondent and Standard Homes Company be required to reimburse the present and former homes prefabrication and assembly employees for all initiation fees, dues or other moneys exacted from them in favor of Teamsters Local 541, including interest thereon at 6 percent per annum computed in the manner set forth in *Seafarers International Union of North America, etc.*, 138 NLRB 1142 with 6 percent interest thereon. *J. Howard Jenks d/b/a Glendora Plumbing*, 165 NLRB 101, 103; 172 NLRB 1700. And it will be recommended that Respondent and Standard Homes Company be ordered to cease giving effect to any Teamsters checkoff

authorizations of said employees and to cease offering to pay Teamsters initiation fees for such employees.[52]

It will be recommended that Respondent and Standard Homes Company make whole each of the aforementioned present and former employees for any loss of pay or other benefits which they may have suffered (as the result of Respondent's unilateral application to them of the terms and conditions of employment of the Teamsters Olathe contract with Standard Homes Company in late February 1972) with interest at 6 percent per annum and to continue such payments[53] until such time as Respondent negotiates in good faith with Carpenters to agreement or impasse.[54]

Further it will be recommended that Respondent and Standard Homes Company preserve and make available

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52. I recommend that the Teamsters initiation fees, dues or any other moneys exacted under the Teamsters Olathe contract be reimbursed to these employees and that their check-off authorizations no longer be implemented in order to remedy fully the Section 8(a)(5) violation which I have found, in addition to remedying the Section 8(a)(1),(2) and (3) violations which were also found. For the union security provisions of the Teamsters contract at Olathe are part and parcel of the terms and conditions of employment unilaterally and unlawfully imposed upon these employees by Respondent by and through Standard Homes Company.

53. Such payment will be pursuant to the terms of the Carpenters contract at Roe Boulevard which otherwise expired on April 30, 1972, because I am unable to conclude what bargain might have been struck as to the homes prefabrication and assembly employees of Standard Homes Company, had such employees been bargained for as part of Carpenters Roe Boulevard unit in the negotiations for a new agreement in the spring of 1972. See *H. K. Porter Company, Inc., etc.* v. *National Labor Relations Board*, 397 U.S. 99; *Tidee Products, Inc.*, 194 NLRB No. 198 (p. 6). Nothing in this aspect of my recommended order is, however, intended to preclude an agreement by the parties making retroactive the effect of the subsequent Carpenters agreement at Roe Boulevard insofar as the instant Standard Homes Company employees are concerned.

54. See *Howard Johnson Company*, 198 NLRB No. 98 (p. 4).

to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amount of moneys due under the terms of the foregoing recommendations.

Finally, it will be recommended that the Respondent and Standard Homes Company be required to post an appropriate notice at their respective involved locations.

Conclusions of Law

1. Respondent and Standard Homes Company are a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters and Teamsters are both labor organizations within the meaning of the Act.

3. By the conduct set forth in section III, above, Respondent by and through Standard Homes Company has rendered unlawful assistance and support to Teamsters and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act.

4. By enforcing the provisions of the union security agreement of the Teamsters contract to the homes prefabrication and assembly employees at Olathe thereby encouraging membership in Teamsters and discouraging membership in Carpenters or its locals, Respondent by and through Standard Homes Company, on and after February 21, 1972, has engaged in, and is engaging in, unfair practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The following unit is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

All production and maintenance employees of Respondent at its Roe Boulevard, Kansas City, Kansas plant and all employees primarily engaged in the prefabrication and assembly of homes at the Olathe, Kansas plant of Standard Homes Company excluding delivery truckdrivers, hardwood finishers, all employees covered by Teamsters Local 541 contract at the said Roe Boulevard plant; also excluding all other employees of Standard Homes Company at its said Olathe plant and excluding all office clerical employees, guards and supervisors at both of said plants.

6. At all times material herein Carpenters has been the majority and exclusive representative of the aforesaid bargaining unit.

7. By refusing to bargain collectively with Carpenters as the exclusive representative of the homes prefabrication and assembly employees at the Standard Homes Company Olathe plant as a part of the aforesaid bargaining unit and by unilaterally changing the terms and conditions of employment of said employees on and after February 20, 1972, Respondent itself and Respondent by and through Standard Homes Company have violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case,

it is recommended that R. L. Sweet Company, Kansas City, Kansas and Standard Homes Company, Olathe, Kansas,[55] their officers, agents, successors and assigns, shall:[56]

1. Cease and desist from:

(a) Assisting Teamsters Local 541, or any other labor organization and from otherwise interfering with the representative of their employees through a labor organization of their own choosing.

(b) Recognizing Teamsters Local 541, or any successor thereto, as the representative of any of the employees in the appropriate collective bargaining unit described below, for dealing with them with respect to rates of pay, wages, hours of employment or any other terms and conditions of employment, both until they have complied with the provisions of this order requiring them to bargain with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, and unless and until Teamsters Local 541 has been certified by the Board as the exclusive representative of the employees in said appropriate unit.

(c) Performing, enforcing or giving effect to the collective bargaining agreement of February 11, 1972, between Teamsters Local 541 and Standard Homes Company

55. Although no charge was filed against Standard Homes Company, it was named in the complaint and its interests were fully and ably represented by its counsel at the hearing. For these reasons and since I have found that Respondent and Standard Homes Company are a single employer within the meaning of the Act, my recommended order shall run against both Respondent and Standard Homes Company. *J. Howard Jenks d/b/a Glendora Plumbing, supra.*

56. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

by applying or enforcing said agreement with respect to any employees in the said appropriate unit, or by entering into or enforcing any extension, renewal or modification or supplement thereof, or any superseding collective bargaining agreement with said labor organization, by applying and enforcing any of said extensions, renewals, modifications, supplements or superseding collective bargaining agreements to any employees in said appropriate unit.

(d) Giving effect to any checkoff authorizations in favor of Teamsters by Standard Homes Company prefabrication and assembly employees or offering to pay Teamsters initiation fees for such employees.

(e) Refusing to bargain collectively with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, as the exclusive representative of all the employees in the following appropriate unit:

All production and maintenance employees of R. L. Sweet Lumber Company at its Roe Boulevard, Kansas City, Kansas, plant and all employees primarily engaged in the prefabrication and assembly of homes at the Olathe, Kansas plant of Standard Homes Company, excluding delivery truckdrivers, hardwood finishers, all employees covered by Teamsters Local 541's collective bargaining agreement at Roe Boulevard plant, all other employees of Standard Homes Company at its said Olathe plant and excluding all office clerical employees, guards and supervisors at both of said plants.

(f) Unilaterally changing the wages, hours and terms and conditions of employment of any employees in the aforesaid appropriate collective bargaining unit.

(g) Encouraging membership in Teamsters Local 541 or any other labor organization, or discouraging membership in Carpenters' District Council of Kansas City and

Vicinity, AFL-CIO, or any of its locals or any other labor organization, by applying or enforcing a collective bargaining agreement containing union security provisions to employees outside of the bargaining unit covered by said collective bargaining agreement or by discriminating in any like or related manner in regard to employees' hire or tenure of employment or any other term and condition of employment.

(h) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent such rights may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Teamsters Local 541 as the collective bargaining representative of the homes prefabrication and assembly employees of Standard Homes Company both until there has been compliance with the provisions of this Order requiring bargaining with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, and thereafter and unless and until Teamsters is certified by the Board as the exclusive representative of the appropriate unit described, *supra*.

(b) Reimburse each of the present and former homes prefabrication and assembly employees of Standard Homes Company for all initiation fees, dues and other moneys if any, exacted pursuant to the terms of the union security agreement between Standard Homes Company and Teamsters Local 541 on and after February 21, 1972, as set forth in "The Remedy" section of the Administrative Law Judge's Decision.

(c) Upon request, bargain collectively with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, as the exclusive bargaining representative of the Standard Homes prefabrication and assembly employees as a part of the appropriate unit described above, concerning the wages, hours and other terms and conditions of employment of said prefabrication and assembly employees.

(d) Make whole any present or former homes prefabrication and assembly employees of Standard Homes Company for any loss of pay or other benefits they may have suffered as the result of the unilateral action of Respondent by and through Standard Homes Company in applying the terms of Teamsters Local 541's Olathe, Kansas, collective bargaining agreement to said employees, with interest at 6 percent per annum, and continue such payments until such time as Respondent and Standard Homes negotiate in good faith with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, to agreement or impasse with respect to said employees.

(e) Preserve and make available to the Board or its agents all payroll and other records, as set forth in "The Remedy" section of the Administrative Law Judge's Decision.

(f) Post at the Roe Boulevard plant of Respondent and the Olathe plant of Standard Homes Company copies of the the notice attached hereto and marked, "Appendix."[57] Copies of this notice, on forms provided by the Regional

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57. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Director for Region 17, after being duly signed by the appropriate representative of Respondent and by the appropriate representative of Standard Homes Company, shall be posted by each at its respective aforesaid plant immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by each at its plant to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 17 within 20 days of the receipt of this Order, what steps Respondent and Standard Homes Company have taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

Dated at Washington, D.C.

/s/ John F. Corbley
Administrative Law Judge

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial at which all sides had the chance to give evidence it has been decided that we, R.L. SWEET LUMBER COMPANY and STANDARD HOMES COMPANY, have violated the National Labor Relations Act and we have been ordered to post this notice.

The National Labor Relations Act gives you as employees, certain rights, including the right to self-organization, to form, join or help unions and to bargain collectively through a representative of your own choosing.

Accordingly we give you these assurances:

WE WILL NOT recognize Teamsters Local 541 (herein called Teamsters) as the collective bargaining representative of the homes prefabrication and assembly employees of Standard Homes Company for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment or other terms and conditions of employment of these employees or give Teamsters any other assistance or support with respect to the representation of these employees.

WE WILL NOT apply, enforce or give effect to the Teamsters' collective bargaining agreement with Standard Homes Company, or any modification, extension or renewal of such agreement, insofar as the homes prefabrication and assembly employees of Standard Homes Company are concerned.

WE WILL NOT encourage membership in Teamsters, or any other labor organization, or discourage membership in Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, or its locals, or any other labor organization by applying, maintaining or enforcing the union security provisions of the collective bargaining agreement between Teamsters and Standard Homes Company upon the homes prefabrication and assembly employees of Standard Homes Company or by discriminating in any like or related manner proscribed by the National Labor Relations Act in regard to the hire or tenure of employment or any other term or condition of employment of these employees.

WE WILL NO LONGER give effect to Teamsters checkoff authorizations by Standard Homes Company prefabrication and assembly employees nor will we offer to pay Teamsters initiation fees for any such employees.

WE WILL NOT refuse to bargain collectively with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, as the exclusive representative of the homes prefabrication and assembly employees of Standard Homes Company as a part of the following appropriate collective bargaining unit:

All production and maintenance employees of R.L. Sweet Lumber Company at its Roe Boulevard, Kansas City, Kansas, plant and all employees primarily engaged in the prefabrication and assembly of homes at the Olathe, Kansas, plant of Standard Homes Company, excluding delivery truckdrivers, hardwood finishers, all employees covered by the Teamsters collective bargaining agreement at said Roe Boulevard plant, all other employees of Standard Homes Company at its said Olathe plant and excluding all office clerical employees, guards and supervisors at both of said plants.

WE WILL NOT in any like or related manner interfere with our employees in the exercise of any rights guaranteed in the National Labor Relations Act.

WE WILL withdraw and withhold recognition from Teamsters as the collective bargaining representative of any of the homes prefabrication and assembly employees of Standard Homes Company, both until we have complied with the provisions of the Board's Order requiring us to bargain with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, and thereafter and unless and until Teamsters is certified by the National Labor Relations Board as the exclusive bargaining representative of the above described appropriate collective bargaining unit.

WE WILL reimburse each of the present and former homes prefabrication and assembly employees of Standard Homes Company for all initiation fees, dues and other moneys, if any, exacted from them pursuant to the union security provisions of the Teamsters collective bargaining agreement with Standard Homes Company, with interest.

WE WILL make whole any present or former homes prefabrication and assembly employees of Standard Homes Company for any loss of pay or other benefits they may have suffered as the result of the application to them of the wages, hours, and other terms and conditions of employment of the Teamsters contract with Standard Homes Company, with interest.

WE WILL bargain with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, as the exclusive bargaining representative of the homes prefabrication and assembly employees of Standard Homes Company as a part of the above described appropriate collective bargaining unit.

R. L. Sweet Lumber Company
(Employer)

Dated _____ By _____
(Representative) (Title)

Standard Homes Company
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616-Two Gateway Center, Fourth at State, Kansas City, Kansas 64101, Tel. No. (816) 374-4434.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

R. L. SWEET LUMBER COMPANY

and

CARPENTERS' DISTRICT COUNCIL OF KANSAS CITY AND VICINITY, AFL-CIO

and

TEAMSTERS LOCAL 541
Party to the Contract

207 NLRB No. 89

Case 17-CA-5292

DECISION AND ORDER

(Decision Issued November 23, 1975)

On May 18, 1973, Administrative Law Judge John F. Corbley issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the general Counsel filed cross-exceptions and a supporting brief to which the Respondent filed an answering brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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1. As the record, exceptions, and briefs adequately present the issues and positions of the parties, the Respondent's request for oral argument is hereby denied.

The Board has considered the record[2] and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, R. L. Sweet Lumber Company, Kansas City, Kansas, and Standard Homes Company, Olathe, Kansas, their officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C., Nov. 23, 1975.

Edward B. Miller, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

2. The Respondent's posthearing motion to complete the record is hereby denied as lacking in merit.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
R. L. SWEET LUMBER COMPANY,
Respondent,
and
STANDARD HOMES COMPANY,
Intervenor.

OPINION

(Opinion Issued May 13, 1975)

NO. 74-1065

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
(NLRB Case No. 17-CA-5292)

Before HOLLOWAY and McWILLIAMS, Circuit Judges, and CHRISTENSEN, District Judge*.

HOLLOWAY, Circuit Judge

The petitioner, National Labor Relations Board, seeks enforcement of its decision and order that Sweet Lumber Company, the respondent, and Standard Homes Company,

*Of the District of Utah, sitting by designation.

the intervenor, cease recognition of Teamsters Local 541 as bargaining agent of certain employees primarily engaged in the prefabrication and assembly of homes at the Standard Homes plant in Olathe, Kansas, and bargain collectively with Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, as the representative of the same employees.

The Board adopted the findings, decision and proposed order of the Administrative Law Judge, 207 NLRB No. 89. It thereby determined that Sweet Lumber—acting by and through its alter ego, Standard Homes—had violated § 8 (a)(1), (2), (3) and (5) of the National Labor Relations Act, 29 USCA § 158(a)(1), (2), (3) and (5), in that (R. 879-80):

> 1. Sweet Lumber, by and through Standard Homes, rendered unlawful assistance and support to the Teamsters in violation of § 8(a)(1) and (2).
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> 2. Sweet Lumber, by and through Standard Homes, enforced the provisions of the union security agreement of the Teamster contract against certain employees at Standard Homes' Olathe plant, thereby encouraging membership in the Teamsters and discouraging membership in the Carpenters, in violation of § 8(a)(1) and (3).
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> 3. Sweet Lumber, by and through Standard Homes, refused to bargain collectively with the Carpenters as the exclusive representative of certain employees at Standard Homes' Olathe plant and unilaterally changed the terms and conditions of employment of said employees, in violation of § 8(a)(1) and (5).

Respondent and intervenor challenge enforcement of the Board's decision and order, arguing principally that:

(1) the charge of unfair labor practices was time-barred by § 10(b) of the Act, 29 USCA § 160(b); and (2) the evidence is insufficient to support the Board's findings of unfair labor practices. We must disagree with the respondent and intervenor, and grant enforcement.

Before treating the issues we will outline the factual background. As we do so, it is convenient to focus on dates in view of the time bar issue raised under § 10(b). Since the unfair labor practices charge was filed on August 18, 1972, the crucial date is February 19, 1972. Charges of unfair labor practices occurring before that date are barred, while those occurring on or after that date are timely.

The factual background

Sweet Lumber is engaged in the wholesale and retail sale of lumber and related products. Its principal office and lumberyard is, and has been since 1952, located at 4400 Roe Boulevard, Kansas City, Kansas. Mrs. R. L. Sweet has been president of Sweet Lumber since the death of Mr. Sweet in 1958. Along with the sale of lumber and other building products, Sweet Lumber has manufactured and sold millwork such as doors, windows and room dividers, and also single-package prefabricated homes. Through October, 1971, the prefab home manufacturing activity was carried on by the Standard Homes Division of Sweet Lumber and through February, 1972, this occurred at the Roe Boulevard location.

At all times pertinent to this case the employees at the Roe Boulevard yard have been represented by two unions. Warehouse and yard employees, including lumber handlers, truckdrivers, loaders, forklift operators and stockmen, have been represented by Teamsters Local 541. Other em-

ployees engaged in the manufacturing process, including millmen and prefab home assemblers, have been represented by Carpenters Local 1635.

In 1971 the directors of Sweet Lumber determined that the Roe Boulevard location was no longer adequate to carry on all of the company's activities, particularly the manufacture of prefab homes. At a directors meeting in June, 1971, it was decided to move the prefab homes operation to another location. In late 1971 land was purchased and construction of a new plant began at Olathe, Kansas, some 19 miles from the Roe Boulevard location.[1]

The directors also decided to incorporate separately the prefab home operation. They changed the name of Construction Loan Company, an existing corporation of which Mrs. Sweet was also president, to Standard Homes Company. Mrs. Sweet remained president of the newly named company. Mrs. Sweet testified that the incorporation of Standard Homes was not related to the decision to move to Olathe (R. 382). Respondent and intervenor also stress the fact that Standard Homes is a Delaware Corporation while Sweet Lumber is a Missouri Corporation in challenging the finding that Standard Homes and Sweet Lumber were a single employer (R. 863), and the finding that the Olathe prefab operation was an accretion to the Roe Boulevard prefab unit, represented by the Carpenters union (R. 865).

After the separate incorporation of Standard Homes, on October 31, 1971, the production of prefab homes continued by the same manufacturing processes at the Roe

1. At Olathe the land and the building are owned by R. L. Sweet Investment Company and all of the stock in that company is held in trust for Mrs. Sweet and her two sons-in-law (R. 352). Standard Homes paid a rental to Sweet Investment Company for use of the land and building (R. 405).

Boulevard plant. An arrangement was arrived at whereby Sweet Lumber sold its prefab homes to Standard Homes for a price that included the value of the materials and a fixed labor cost for each unit. Fixed assets and various items of property of Standard Homes Division were sold at the book value by Sweet Lumber to Standard Homes Company on November 1, 1971. Although a separate office was temporarily set up for Standard Homes Company office employees at Roe Boulevard and some office employees were paid on Standard Homes Company checks at least in January and February of 1972, the prefab production employees continued to be employed and paid by Sweet Lumber.

In August, 1971, a "Staff Bulletin" was placed in the timecard slots of the employees at Roe Boulevard relating the news of the planned move to Olathe. The bulletin stated that the new plant would be occupied by "Standard Homes Company, a division of Sweet Lumber" and that January, 1972, was the target date for completion (Ex. 4, R. 795).

Preparations for occupying the Olathe plant began in January, 1972. Early that month, Frank Woodbury and Charles Roberts went out to the Olathe site to coordinate completion of the plant with the general contractor. Lumber also began arriving that month, and four employees were hired to unload the initial lumber deliveries and to build racks and other facilities. One of these men, Kline, had been a member of the Teamsters unit at Roe Boulevard and became a foreman at Olathe. The other three—Streeter, Nicely and Brown—were new employees.

On January 24, 1972, Aubrey Williamson, a business agent of Teamsters Local 541, visited Olathe and obtained signed authorization cards from Kline, Streeter, Nicely

and Brown (R. 257-258, 275, 855). On February 4, Williamson met with Eugene Smith, then the vice-president of Standard Homes, and Charles Hoffhaus, attorney for Sweet Lumber, and presented the signed authorization cards. After verifying the signatures, Smith and Hoffhaus agreed to bargain, and on February 11, Standard Homes and Teamsters Local 541 executed a contract running from February 7, 1972, to February 2, 1975, with a provision for automatic renewal (R. 260, 669, 855). The contract wage scale provided for a minimum hourly wage of $3.50 per hour. By its terms, the contract covered "all production and maintenance employees at the Employer's Olathe, Kansas plant including truck drivers" and contained a union security clause requiring all employees to join Teamsters Local 541 within 31 days after beginning employment.

At the time that the contract was signed, only four men (Kline, Streeter, Nicely and Brown) were performing work that could be covered by its terms. As mentioned, their work consisted of unloading lumber and building racks and other facilities. No production was being done at Olathe at this time,[2] and Smith testified that at the time he signed the contract, he knew that he would have 12 to 13 more non-office employees working at Olathe shortly.

In mid-February, Smith began interviewing Sweet Lumber employees at the Roe Boulevard plant to determine whether they would accept employment at Olathe. Among these were four men who were working in the prefab homes operation at Roe Boulevard and were members of Carpenters Local 1635. These four—Coffelt, Schaffer, Fisher and Papineau—all eventually accepted employ-

2. Vice-President Smith was still officing at Roe Boulevard and the office employees of Standard Homes were also still at Roe Boulevard.

ment at Olathe. Except for Coffelt, who was on vacation and whom Smith went to see at home, they were interviewed in Smith's office at the Roe Boulevard plant. Smith told all four men that there would be only one union at Olathe—the Teamsters.[3]

The men testified that they began work at Olathe sometime between February 23 and February 29, but that no production work on prefab homes took place before February 29 and that work done prior to that date was maintenance work to prepare for production.[4] Once production started, they testified that they did the same job as at Roe Boulevard with the same tools they had used there. None of these four joined the Teamsters immediately on arrival at Olathe, but did join Teamsters Local 541 eventually.[5]

3. While all four were initially offered a wage rate of $3.75 per hour under the Teamsters contract, they were all eventually paid at a "leadman" rate of $4.50 or higher. At that time, all four had been making $5.06 ½ per hour at Roe Boulevard under the Carpenters' contract. Fisher, in fact, was paid his Roe Boulevard wage for his first two days at Olathe, which were not counted as "official" days at work there. Thereafter, he was paid at the lower wage of $4.50 per hour.

4. The Board found that production began at Olathe on February 29, 1972. See note 8, infra.

5. Coffelt testified that Kline, who at this time was working as a foreman at Olathe, referred him to a Teamsters agent, and Schaffer similarly testified that either Kline or another foreman had referred him to the agent. Both testified that they had wanted to wait to see what the Carpenters were going to do before joining the Teamsters. Papineau stated that when he indicated to Kline his reluctance to join the Teamsters, remarking that Kansas was a right to work state Kline had told him that he could be transferred to a plant owned by respondent in Missouri where there was no right to work law. Finally, Fisher testified that he had had an argument with Smith over paying the Teamsters $100 dollar initiation fee and that Smith had indicated that the company might be able to pay it for him if Fisher would not pay it. Fisher however, refused and paid the fee himself.

On February 20, 1972, before the prefab workers began production at Olathe, a Carpenters' representative—Harding—questioned Mr. Hatcher, vice-president of Sweet Lumber that handled union matters, about the transfer of employees to Olathe (R. 31-32). Hatcher informed Harding at that time that the "facility out there was a wholly owned Delaware corporation and was not part of Sweet Company, there was nothing to discuss." (R. 31). Harding indicated at that time to Hatcher that they would "process the thing through the provisions of our contract that refer to grievance procedure." (R. 31). This was found to be a refusal by Sweet Lumber to bargain with the Carpenters union (R. 871), and it was found also that the refusal to bargain continued by two other acts in March and April, 1972 (R. 872).

As stated, on August 18, 1972, the charge of unfair labor practices—essentially refusing to bargain with the Carpenters union concerning the Olathe operation and illegal support of the Teamsters union—was filed which culminated in the challenged order. We turn now to respondent's grounds for opposing enforcement of the order.

I

Whether the charge of unfair labor practices was time barred by § 10(b)

Respondent argues that the unfair labor practices alleged by the charge are time barred by § 10(b) of the Act, 29 USCA § 160(b). It maintains that all acts involved herein depend on the legitimacy of the Teamsters contract executed on February 11, 1972, which is the significant event for limitations purposes. It says that since the charge in this case was not filed until August 18, 1972, acts occurring prior to February 19, 1972, would be barred under

the six-month limitation provision of § 10(b), and that all charges of violations are thus untimely.

The amended complaint (see R. 827) had challenged the validity of the February 11 contract, but the Board found that § 10(b) foreclosed consideration of whether the recognition was lawful (R. 866-67) and on this basis refused to set aside the bargaining agreement. This ruling is not challenged. The Board went on to determine, however, that the bar did not apply to the allegation that the Teamsters contract was unlawfully applied after February 18 against Carpenters members from Roe Boulevard who had begun working at Olathe.

Respondent argues that, as a matter of law, the § 10(b) bar must be given effect against all the alleged unfair practices, relying principally on Local Lodge No. 1424, National Ass'n of Machinists, AFL-CIO v. NLRB, 362 U.S. 411 (the *Bryan* case) and NLRB v. Serv-All Co., 491 F.2d 1273 (10th Cir.). We cannot, however, agree that either *Bryan* or *Serv-All* dictate a denial of enforcement.

In *Bryan*, the employer had entered into a collective bargaining agreement with a union that did not represent a majority of the employees at the time that the original agreement was executed. Charges were filed with the Board 10 and 12 months after the execution of the agreement. Conceding to the Court that the charges as to the contract's execution were barred by § 10(b), the Board nevertheless argued that continued enforcement by the employer and the union was a separate and continuing unfair labor practice not protected by § 10(b).

Disagreeing, the Court noted that the union security clause and its enforcement, standing alone, were wholly innocent and could not be charged as an unfair labor practice except through reliance on the illegality of the execu-

tion of the original agreement. Under such circumstances, and since the execution of the agreement was over six months prior to the filing of the charges, the Court held that § 10(b) barred reference to the illegal nature of the agreement's execution and thus its illegality could not cast a shadow across the agreement's subsequent enforcement.

We should note, however, the limitations stated by the Court to its holding in *Bryan*, 362 U.S. at 422, 423:

> [W]e need not go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso.
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> . . . .
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> In any real sense, then, the complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution.

The Court pointed out that earlier events back of the § 10(b) period may be utilized to shed light on the true character of matters occurring within the limitations period, but concluded that the situation in *Bryan* was one "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice." Id. at 416-17.

Respondent contends that here, as in *Bryan*, the date of the contract's execution is controlling for § 10(b) purposes. The Teamsters contract, respondent points out, on its face covers "all production and maintenance employees" at Olathe (¶ 2, R. 669). Necessarily then, says the respondent, if the Carpenters rights were violated, this occurred at the time that the contract was signed. And if the contract's validity is beyond scrutiny, charges as to its subsequent application to the Carpenters are also barred.

We do not feel that Bryan established a black and white rule in all cases where a contract's execution is related to the unfair labor practice charges that would bar such charges where the contract's execution was beyond the six-month period.[6] Indeed, the Court referred to the Board's attitute lending support to its views, comparing cases held timely by the Board "where evidence as to events during the barred period was used to illuminate current conduct claimed in itself to be an unfair labor practice . . ." with others held untimely ". . . where the gravamen of the unfair labor practice complained of lay in a fact or event occurring during the barred period." *Bryan*, supra at 419-20. And the Court cited Board cases holding charges untimely where ". . . the evidence in fact marshalled from within the six-month period is not substantial, and the merit of the allegations in the complaint is shown largely by reliance on the earlier events." Id. at 421. The Court stated, id. at 422:

> However, we express no view on the problem raised by such cases, for here we need not go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso.

We feel that we do not have a case where the contract execution date in itself is controlling, and instead must consider the circumstances surrounding several actions and

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6. The Court made clear that *Bryan* was a case "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice," *Bryan*, supra at 416-17—there the unfair labor practice being agreement with a union not representing a majority at the time of original execution of the contract.

events to determine when the gravamen of the unlawful practices charged occurred. In determining this, we believe it is important to view the facts in light of the Board's findings, which we sustain.[7] We must focus on whether, in substance, the unfair labor practices of refusal to bargain with the Carpenters union and illegal support of the Teamsters, and the like occurred before or after the critical date —February 19, 1972.

As stated, the Sweet Lumber contract with the Teamsters was executed on February 11. However, despite the separate incorporation of Standard Homes and the subsequent move of prefabrication operations to Olathe, it was found that Standard Homes and respondent remained a single employer, Standard Homes being the alter ego of Sweet Lumber. Hence all prefabrication employees whether working at Roe Boulevard or Olathe, continued to be represented by the Carpenters. The Board also found that at the time of the execution of the Teamsters contract, the only employees working at Olathe were four engaged primarily in unloading lumber, etc. (R. 868), which was not prefab work. In fact, the Board found that no prefab production began at Olathe until on or after February 21 (R. 870). See note 8, infra.

The situation up to February 21, therefore, was that prefabrication production workers were still working at Roe Boulevard under the Carpenters contract and had not yet begun work at Olathe, while four non-prefab production workers—one of whom was a former Teamsters 541 member—had gained recognition of the Teamsters as their bargaining agent.

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7. The respondent and intervenor vigorously challenge the Board's findings. However for reasons stated later, we conclude that there is substantial evidence to support the findings and sustain them.

It was found that the Teamsters contract was enforced at Olathe in violation of § 8(a)(1)(2) and (3) (the interference; domination and support; and encouragement of membership unfair labor practices), and that the Teamsters union was unlawfully assisted, at times occurring within the § 10(b) period (R. 868). In fact, not until on or about February 21 were any of the Carpenters prefab workers working at Olathe (R. 868, 870; *e.g.* R. 108).[8] It was also found that the Teamsters contract, with its lower wage rates and different benefits, was applied to the prefab and assembly workers upon their employment at Olathe (R. 868; see R. 221-38). Such acts in applying the Teamsters contract thus come within the § 10(b) period.

We do note, in connection with the finding as to enforcement by intervenor of the Teamsters contract's union security clause, the finding that Standard Homes' vice-president Smith advised Coffelt on about February 17, and Fisher and Papineau a few days later, that the employees at Olathe would be represented by one union—the Teamsters (R. 868). However, it was found that after the employees had begun work at Olathe, further efforts were made by respondent to have the employees join the Teamsters (R. 869). These acts included a remark by a Standard Homes foreman that Papineau could be transferred to Missouri (where there was no right to work law) when Papineau raised a right to work law objection after the foreman spoke to him about joining the Teamsters union (R. 869; see note 5, supra). And there was also discussion within the § 10(b) period of possible payment by Standard Homes of the Teamsters' initiation fee for Fisher, which offer was declined (R. 869; see note 5, supra).

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8. The Board found that the first prefab home package was produced on February 29 at the Standard Homes Olathe plant (R. 856), and the findings stated that production began on February 29, 1972 (R. 861).

And, as stated earlier, it was found that on February 20, 1972, respondent refused to bargain with the Carpenters concerning the Olathe operation, and that the refusal was repeated by two later acts in March and April, 1972 (R. 871-72).

In view of these findings, we cannot agree that NLRB v. Serv-All Co., 491 F.2d 1273 (10th Cir.) dictates a denial of enforcement. There the employer indicated by several acts outside the § 10(b) period that it would not abide by a new contract made by a multi-employer bargaining group and the union. The Board held the charges timely on the ground that the initial refusal to bargain recurred within the six-month period. This Court held that the record did not support a finding that the refusal to bargain recurred within the period, and further rejected the views of the Board as faulty in law in applying the recurring violation theory. Here, we do not feel we have a recurring violation question as in *Serv-All*, but rather a problem whether conduct which itself is the gravamen of the unfair labor practices charged occurred within the § 10(b) period. *Bryan*, supra, at 419-20.

While the case is not free from doubt, we are persuaded that in these circumstances the contract execution date is not controlling. We conclude that the substantial active conduct adversely affecting the Carpenters union and those whom it was entitled to represent, and constituting the unfair labor practices found, fell within the six month period. See Shumate v. NLRB, 452 F.2d 717, 719-20 (4th Cir.); Local Union No. 167, Progressive Mine Workers of America v. NLRB, 422 F.2d 538, 542-43 (7th Cir.); NLRB v. Plumbers & Pipe Fitters Local Union 214, 298 F.2d 427 (7th Cir.); cf. NLRB v. New Mexico District Council of Carpenters, 45 F.2d 1116, 1119-20 (10th Cir.). Accordingly we hold that the charges were not barred by § 10(b) as to the unfair labor practices found.

II

Whether there is substantial evidence supporting the Board's findings and order

As stated the Board adopted the Administrative Law Judge's findings of unfair labor practices, and respondent and intervenor vigorously challenge the findings. In reviewing them we are enjoined by Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88, to review the record as a whole, taking into consideration not only evidence supporting the findings, but contradictory and conflicting evidence as well. However, we may not ignore the Board's expertise or displace its findings between two fairly conflicting views, even though we would have made a different choice had the matter been before us *de novo*. Id. at 488. If such review of the record as a whole reveals substantial evidence supporting the findings, they must not be disturbed. Id. at 485.

a. *The finding that Sweet Lumber and Standard Homes were a single employer*

The Board found that Sweet Lumber and Standard Homes were a single employer under § 2(2) of the Act, 29 USCA § 152(2). Such a view of separate legal entities may be made when necessary to safeguard statutory rights. See NLRB v. Gibraltar Industries, Inc., 307 F.2d 428, 431 (4th Cir.). The controlling criteria are the interrelation of relations, common management, centralized control of labor operations, and common ownership. See Radio & Television Broadcast Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc., 380 U.S. 255; NLRB v. Jordan Bus Co., 380 F.2d 219, 221 (10th Cir.). The determination is essentially a factual one and will not be set aside unless clearly erroneous. See NLRB v. M. P. Build-

ing Corp., 411 F.2d 567, 568 (5th Cir.); NLRB v. A. E. Nettleton Co., 241 F.2d 130 (2d Cir.).

On consideration of the record as a whole and the arguments by respondent and intervenor, we are satisfied that the findings are supported by substantial evidence. The challenges to the findings are essentially premised on the stressing of conflicting evidence such as testimony by Mrs. Sweet, president of both companies, that Mr. Smith was in complete control of important matters at Standard Homes. There were, however, conflicting admissions as to her degree of control. In any event there was substantial proof of common management as to several officers, including Mrs. Sweet who served both companies as president.

In addition, as to its operations respondent vigorously argues that Standard Homes was putting out a totally different product and using different purchasing and production methods at Olathe. Again the contention is based on portions of the proof admittedly favoring respondent, while there was conflicting proof. For example, each of four Carpenters who testified stated he did essentially the same work with the same tools as he had done at Roe Boulevard.

We are satisfied that there was substantial proof as to common management, common ownership, centralized control of labor policy, and interrelation of operations. We feel the record amply supports the finding.

b. *The finding that the Standard Homes prefabrication employees are a part of or an accretion to the Carpenters unit at Roe Boulevard*

The Board's finding of accretion is similar to its function of determining the appropriateness of particular units for bargaining purposes. See NLRB v. Sunset House,

415 F.2d 545, 547 (9th Cir.). The determination is one involving the Board's discretion and should not be set aside unless a reviewing court is convinced that the Board has acted in an arbitrary and capricious manner. NLRB v. Baton Rouge Waterworks Co., 417 F.2d 1065, 1067 (5th Cir.); International Union, UAW v. NLRB, 231 F.2d 237, 243 (7th Cir.).

The factors weighed by the Board include functional integration of the business, centralized management, similarity of working conditions, collective bargaining history, local power to hire and fire, lack of employee interchange, and geographical distance. NLRB v. Sunset House, supra at 548. The findings related to the single employer determination are obviously relevant again.

In addition, here the Board found that employees at Olathe were doing the same work with the same equipment as at Roe Boulevard; that the product was essentially the same; that employee seniority had been transferred from Roe to Olathe, at least as to vacation rights; that management of the companies was essentially the same; and that there was in fact little evidence of interchange between production employees and others at Olathe. In contesting the findings respondent again argues conflicting interpretations, saying that Olathe was obviously going to be a plant for production of mass-produced homes and that when employees were added to implement such production, they were accreted to the Olathe plant, and not to the Roe plant where such production had permanently ceased. We are not persuaded by the different emphasis. We must agree that the Board's findings are supported by substantial proof.

Respondent argues further that recognition of the Carpenters as the bargaining representative of the prefab pro-

duction employees would have constituted an unfair labor practice, relying on NLRB v. Hudson Berlind Corp., 494 F.2d 1200 (2d Cir.). There, however, a new facility was established consolidating two older separate facilities, each represented by a different union. The Board found no accretion and the finding was sustained. In view of the finding of no accretion and the presence of conflicting unions, the employer's bargaining with one union was viewed as a violation of its duty of neutrality. See Midwest Piping Co., 63 NLRB 1060. We view the case as inapposite since it was based on a contrary determination of no accretion.

We view the record as a whole as amply sustaining the accretion finding here.

c. *The Board's findings of violations of § 8(a)(5) and (1)*

Respondent argues there is insufficient evidence to support the findings of violation of § 8(a)(5) and (1), 29 USCA § 158(a)(5) and (1), refusal to bargain and interference with employees' rights. More specifically respondent says it notified the Carpenters concerning the move to Olathe and that the union waived its right to bargain by not promptly requesting negotiations concerning the move; that the Carpenters contract with respondent was limited to the Roe Boulevard plant; that the management rights clause in the contract permitted respondent to discontinue the prefab operations without bargaining with the Carpenters union; that the Olathe employees voluntarily left the Carpenters unit at Roe Boulevard; and that there was no substantial detriment to the Carpenters.

In support of respondent's position the record does show the distribution of the August, 1971, bulletin to the

Roe Boulevard employees about the new plant and the Standard Homes move (R. 795)[9], and testimony by employee Shaffer that the move was common knowledge.

The Board found that the Carpenters union was not formally notified of the move nor offered a reasonable opportunity to bargain about the move or its consequences. And the findings stated that even if notice to employees served as formal notice to the union, the Judge disagreed that the Carpenters union was given an adequate notice of the opportunity to bargain on the matter, there being no indication in the notice that the move would result in any change in the terms and conditions of employment of Carpenters unit employees (R. 872).

We sustain the findings. The lack of formal notice to the union is supported by testimony of the business representative, Mr. Harding. Moreover the bulletin referred to a change in location, but without mention of a change in corporate status or conditions of employment (R. 795). See NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 194-95 (3d Cir.). We are not persuaded by the notice argument, since the employer must provide the union with notice of a vital change in working conditions. See NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir.).[10]

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9. The respondent points out that such distribution to all employees included Mr. Boyce, the union steward. He testified he did not see any Sweet Lumber literature distributed at Roe Boulevard about the Olathe plant (R. 175-176). This point is not resolved by the Board's findings, the Board concluding that adequate notice was not given by the bulletin in any event (R. 872).

10. Reliance on NLRB v. Spun-Jee Corp., 385 F.2d 379 (2d Cir.) is misplaced. The information there conveyed was informal but complete, while here the bulletin did not give information sufficient to alert the union to bargain, and thus did not constitute sufficient notice.

Since we sustain the finding of lack of adequate notice to the Carpenters union concerning the relocation to Olathe, we are not persuaded that there was waiver by the union's failure to demand bargaining concerning the move before Harding's discussion on February 20, 1972, with Mr. Hatcher. As stated earlier, we sustain the finding that Harding then sought to discuss the transfer and that respondent refused to bargain (R. 871).

A further waiver argument is made on failure of the Carpenters union to attempt bargaining concerning the Olathe plant when the Roe Boulevard contract was renegotiated in April and May of 1972. There was no discussion by the Union concerning the Olathe employees in those negotiations. However, the failure to make such a demand in those negotiations was found not to have absolved respondent of its duty to bargain, and we sustain this determination. Any such waiver of the Union's right to bargain must be clear and unmistakable. See Murphy Diesel Co. v. NLRB, 454 F.2d 303, 306-07 (7th Cir.). We accept the determination that no waiver of the right to bargain occurred. In addition we are not persuaded by the waiver argument since it would seem futile that the Carpenters union again attempt to bargain about the Olathe plant when efforts to do so had been rebuffed three times previously (R. 874).

Respondent argues that the management rights clause in Article XIX of the 1970-1972 contract with the Carpenters gave it the right to determine what products should not be manufactured and the right to introduce new facilities (R. 632). It says that Olathe was such a new facility that the company had a right to establish and that it did not have to bargain for the right again. Here, however, application of the Teamsters contract effected substantial changes in terms and conditions of employment. As the Board's decision points out, any waiver of the right to bargain about mandatory subjects of collective bargaining must be clear and unequivocal. See Weltronic Co., 173 NLRB 235; enforced, 419 F.2d 1120 (6th Cir.). We must agree the contract did not go so far. And despite the right to introduce the new facility, there was still a duty to bargain about the effects on employees represented by the Carpenters. See NLRB v. Thompson Transport Co., 406 F.2d 698, 702-03 (10th Cir.).

Respondent argues that the employees voluntarily left the Carpenters unit at Roe Boulevard and accepted employment at Olathe and that consequently they are not proper subjects for bargaining. We must disagree. The voluntary response by employees directly approached did not extinguish the duty to bargain, or constitute a defense to the charge of refusal to bargain with the bargaining representative. See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678.

d. *The Board's findings of violations of § 8(a)(2)(3) and (1)*

There remain respondent's and intervenor's arguments against the findings of unlawful assistance to the Teamsters union in violation of § 8(a)(2)(3) and (1), the "domination" and "illegal support" findings. Essentially respondent argues that these charges were time barred, and were clearly erroneous since separate corporations and an utterly new and different type of industrial labor unit was involved, having no affiliation with the cabinet makers at Roe Boulevard. For reasons already stated, we must reject the time bar argument and the factual arguments about the operations at the two plants.

We have considered these objections and others advanced against the findings. We are persuaded there is substantial evidence on the record as a whole to support the findings and must sustain them.

We are satisfied that the findings of the Board are supported by substantial evidence as to the unfair labor practices found and we must reject the defense that the charges were barred by § 10(b). Accordingly the order will be enforced.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

R. L. SWEET LUMBER COMPANY,
Respondent,

and

STANDARD HOMES COMPANY,
Intervenor.

NO. 74-1065

(NLRB Case No. 17-CA-5292)

JUDGMENT

(Judgment Entered June 5, 1975)

Before: Holloway and McWilliams, Circuit Judges, and Christensen, District Judge*

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*Of the District of Utah, sitting by designation.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, R. L. Sweet Lumber Company, and Standard Homes Company, their officers, agents, successors, and assigns on November 23, 1973. The Court heard argument of respective counsel on September 13, 1974, and has considered the briefs and

opposition

No. 75-321

Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

R.L. SWEET LUMBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
SANDRA SHANDS ELLIGERS,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 55-76) is reported at 515 F.2d 785. The Board's decision and order (Pet. App. 1-54) are reported at 207 NLRB 529.

JURISDICTION

The judgment of the court of appeals (Pet. App. 77-78) was entered on June 5, 1975. The petition for a writ of certiorari was filed on August 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's findings that the Company violated the National Labor Relations Act by unilaterally changing the wages and working conditions of a unit of its employees, refusing to negotiate with their bargaining representative, compelling them to join another union, and applying that union's contract to them were barred by the six-month limitations period in Section 10(b) of the Act.

STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(b)) is set forth in pertinent part at pp. 3-4 of the petition.

STATEMENT

Since 1952 R.L. Sweet Lumber Company ("the Company") has operated a lumber business on Roe Boulevard in Kansas City, Kansas, where, in addition to selling lumber and other building materials, it manufactured and sold millwork and single-package prefabricated homes (Pet. App. 5-6). The manufacturing employees were members of Carpenters Local 1635, Carpenters District Council of Kansas City, AFL-CIO ("the Carpenters"), and were represented in a separate unit of that union under a collective bargaining agreement (Pet. App. 6). Another unit composed of warehouse and yard employees was represented by Teamsters Local 541 (Pet. App. 5-6).

Because the prefabricated home operation needed additional space, the Company decided to build a new plant for that operation at Olathe, Kansas, 19 miles from the Roe Boulevard plant. Construction of the new

plant began in 1971, at which time the Company also separately incorporated the prefabricated home operation and changed its name to Standard Homes Company (Pet. App. 6, 7).

In January 1972, with the new plant almost completed, the Company transferred an employee from the Teamsters unit at Roe Boulevard to Olathe and hired three new employees to unload the initial lumber deliveries and to do preparatory work, prior to commencement of production (Pet. App. 8, 9). On January 24, the 4 employees were visited by a Teamsters Local 541 business agent and signed authorization cards. Standard Homes Company subsequently recognized the Teamsters and, on February 11, executed a contract with that union which ran from February 7, 1972 until February 2, 1975 (Pet. App. 9). The contract covered "all production and maintenance employees at the Employer's Olathe, Kansas plant including truck drivers," and contained a union security clause requiring all employees to join Teamsters Local 541 within 31 days of employment (Pet. App. 60).

In mid-February 1972, the Company began interviewing pre-fab employees at Roe Boulevard about working at Olathe. Four employees who were members of the Carpenters unit agreed to the change and began work at Olathe between February 23 and February 29, 1972 (Pet. App. 10, 28, 60-61). Prefab production began at Olathe on February 29, with the four employees doing the same work with the same tools as they had at Roe Boulevard (Pet. App. 28). However, the Teamsters contract, with lower wage rates and different benefits than the Roe Boulevard Carpenters contract, was applied to the prefab workers (*ibid.*). They were told that the Teamsters would be the only union at Olathe and were coerced by the Company into joining that union (Pet. App. 28-30).

On February 20, after having been notified of the impending transfer of one of the Carpenters unit employees to Olathe, a Carpenters representative requested bargaining concerning the transfer. The Company replied that the Olathe facility was a wholly owned Delaware corporation and was not part of Sweet Company. "Hence * * * [there was] nothing to discuss" (Pet. App. 11). In March and April, further requests to bargain about the transfer were also denied (Pet. App. 12-13). On August 18, 1972, the Carpenters filed an unfair labor practice charge against the Company (Pet. App. 1-2).

The Board found that the Company's Roe Boulevard and Olathe operations constituted a single employer within the meaning of the Act (Pet. App. 16-21), and that the latter's prefab operations constituted an accretion to the former's Carpenters unit (Pet. App. 21-25). The Board therefore concluded that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wages and working conditions of the prefab employees after their transfer to Olathe, and by failing to recognize and bargain with the Carpenters as their representative (Pet. App. 33). The Board also concluded that the Company violated Section 8(a)(2), (3), and (1) of the Act by applying the Teamsters contract to the Olathe prefab employees and by insisting that they become members of that union (Pet. App. 30-31).

The Board refused to find that the execution of the contract with the Teamsters was an unfair labor practice because that event had occurred prior to the six-month limitations period of Section 10(b) of the Act (Pet. App. 26).[1] However, the Board found that the

[1]The charge was filed on August 18, 1972 (Pet. App. 1). The six-month period of limitations therefore excluded unfair labor practice prior to February 19, 1972 (Pet. App. 26, n. 36). The collective agreement was executed on February 11, 1972 (Pet. App. 25).

unfair labor practices of refusal to deal with the Carpenters concerning the prefab employees, unilateral changes in those employees' benefits, and compulsion of the employees to join the Teamsters occurred within the six-month period and were therefore not time barred (Pet. App. 27).

The Board ordered the Company, *inter alia,* to bargain with the Carpenters as the representative of the Olathe prefab employees, to withdraw recognition from the Teamsters as the representative of those employees, to cease applying the Teamsters contract to those employees, and to reimburse them for losses they may have incurred due to the Company's unlawful conduct (Pet. App. 39-41, 43-48).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 55-76). In agreeing with the Board that the violations were not barred by Section 10(b) of the Act, the court rejected the Company's argument that the violations were grounded on execution of the collective agreement, concluding rather "that the substantial active conduct adversely affecting the Carpenters union and those whom it was entitled to represent, and constituting the unfair labor practices found, fell within the six month period" (Pet. App. 68). The court specifically rejected petitioner's argument, repeated here, that *Local Lodge No. 1424, Machinists* v. *National Labor Relations Board (Bryan),* 362 U.S. 411, and appellate decisions following it require a contrary result (Pet. App. 63-68).

ARGUMENT

In *Bryan, supra,* 362 U.S. at 419, this Court held that, where "a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of

limitations, cannot itself be made the subject of an unfair labor practice complaint," the policies underlying the Section 10(b) limitations period preclude converting "what is otherwise legal into something illegal."[2] In an attempt to fit this case within *Bryan,* petitioner asserts (Pet. 10, 15) that the gravamen of the charge here was that the Company had executed a collective agreement with a "minority" union, an event that occurred outside the Section 10(b) period. Petitioner misconceives the nature of the unfair labor practices found by the Board.

As shown above, the Board refused to find, as charged in the complaint, that the Company unlawfully assisted the Teamsters by executing, on February 11, 1972, a contract with it before a representative complement of material handlers were hired, holding that such a finding was barred by Section 10(b). The gravamen of the charges that the Board upheld is that the Company enforced that contract against the *prefab employees* whom the Teamsters "did not represent * * * since, despite their assignment to Olathe, such employees continued to be included in the Carpenters unit at Roe Boulevard" (Pet. App. 27). This action, as well as the Company's subsequent refusal to bargain with the Carpenters respecting the Olathe prefab employees, occurred after Febrary 19, 1972,[3] when the 10(b) period began, and constitutes unfair labor practices wholly apart from the existence, or validity, of the Company's contract with the Teamsters.

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[2]In *Bryan* the employer, outside the 10(b) period, had entered into an exclusive recognition contract, with a union security clause, at a time when the union did not represent a majority of the employees. His only action within the 10(b) period consisted of enforcement of that contract, which was valid on its face.

[3]Prefab production began at Olathe on February 29, 1972 (*supra,* p. 3).

Tennessee Products & Chemical Corp. v. *National Labor Relations Board,* 423 F.2d 169 (C.A. 6) (Pet. 16), is not to the contrary. There, as in *Bryan,* an unfair labor practice could be found only by establishing that a contract, valid on its face, was entered into with the employer's unlawful assistance, an event which occurred outside the 10(b) period (423 F.2d at 179-180). In *National Labor Relations Board* v. *Brown,* 310 F. 2d 539 (C.A. 9) (Pet. 17), the "formation of the Association, execution of the employer-Association contracts, and adoption of the constitution and by-laws of the Association all occurred" outside the 10(b) period, and there was "no substantial evidence in the record to support the finding of the Board that Respondent Employer within the six months period dominated, interfered with, or supported the Association" (310 F.2d at 545-546). Here, as shown, there was "substantial evidence" of unfair labor practice conduct occurring within the 10(b) period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
SANDRA SHANDS ELLIGERS,
Attorneys,
National Labor Relations Board.

NOVEMBER 1975.

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